

OHIO STATE JOURNAL ON DISPUTE RESOLUTION

VOLUME 3

1987

NUMBER 1

Hosting Settlement Conferences: Effectiveness in the Judicial Role*

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I. INTRODUCTION

This Article offers suggestions about the ways in which the host of a settlement conference can function most effectively. These suggestions are directed towards judges, but, for the most part, should be useful to anyone who serves as the neutral in a negotiation process. The results of the A.B.A. survey of "Litigators' Views About Appropriate Roles and Effective Techniques for Federal Judges" [A.B.A. survey] demonstrate that the vast majority of litigators believe that judges are in a position to make valuable contributions to the settlement process.¹ In fact, lawyers want judges to become more assertively involved in settlement than has been the norm in most courts in the past.² It seems clear that judges are going to be under continuing and increasing pressure to make settlement work a major part of their job description. Thus it is important for judges to think systematically and carefully about how they perform this important function.

This Article begins by discussing the mind set, or attitudes, that are most appropriate for a judicial host of a settlement negotiation. Then it discusses factors judges should consider when identifying the points in the pretrial period when a settlement conference is sufficiently likely to be productive to warrant the effort. Thereafter, the discussion will address different ways judges might format or structure settlement conferences, and comment on the pros and cons of each. The next section consists of a detailed prescription for conducting the kind of settlement conference that some judges have found to be most pro-

*This Article is adapted from Chapter 10 of W. BRAZIL, *EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES* (Prentice Hall Law and Business 1988).—Ed.

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1. W. BRAZIL, *SETTLING CIVIL SUITS* 39 (1985).

2. *Id.* at 44.

ductive.³ Along the way, the Article will suggest numerous ways to respond constructively to problem behavior by lawyers or clients and how to break negotiation logjams. The latter section will include numerous examples of ways the host of the conference can damage the prospects of achieving settlement or alienate participants in the process. Many of these examples are based on mistakes I have made in settlement conferences. By openly discussing these errors, I hope to help others avoid them. I also hope that this section of the Article bears witness to the sincerity of my disclaimer that I enjoy any special success as a settlement facilitator. I claim no corner on the insight, wisdom, or self-control markets; I know many judges who are more effective settlement facilitators than I am. If I have any standing to write this Article, it derives from my dislike of failure; I have spent considerable time trying to figure out why settlement conferences I have hosted have failed and what I might do to reduce the odds that such failures will recur.

Judges who are looking for secret tricks or for quick and dirty solutions to settlement problems will search these pages in vain. There is no magic formula for settling cases. Instead, the keys to judicial effectiveness in settlement negotiations are rather straightforward: solid preparation, good timing, a balanced blend of self-assurance and humility, the ability to listen and to listen creatively, sensitivity to the needs and moods of other people, thoughtful substantive analysis, patience, tenacity, flexibility, and the good fortune to be dealing with attorneys and parties who are rational.

II. THE APPROPRIATE MIND SET

Before turning to a discussion of specific approaches and techniques, it is important to emphasize a few general points about the judicial role in settlement. Judges do not settle lawsuits. The parties and their lawyers settle lawsuits. Judges can facilitate the process, can help remove obstacles to communication, and can help refine the parties' analyses, but settlement judges do not have the power to force any litigant or lawyer to accept either their views or a settlement proposal they feel is eminently reasonable. Because they do not have the power to assure that parties reach settlement, judges should not feel responsible every time a settlement is not achieved.

It is important that the judge not feel an exaggerated sense of responsibility to reach a settlement. Such a feeling can make the judge intense and impatient and cause the judge to behave counterproductively. Anger is virtually never an appropriate emotion for a settlement facilitator to express. Moreover, a judge who views every settlement conference that does not close with an agreement as a personal failure will

3. Author's personal experience.

soon lose interest in hosting settlement conferences. Most settlement conferences do not result in immediate agreements. But the A.B.A. survey shows that judges can make subtle and significant contributions even in conferences that seem to go nowhere.⁴ In many cases, the parties cannot reach an agreement in the first conference; two or more conferences are often essential. A judge who expects too much either will burn out before the follow-up conference or will be unproductively impatient during the conference. It is wiser for the judge to put less pressure on himself, to be prepared to meet with the parties more than once, and to walk away unencumbered by any sense of failure if the parties, after his good faith efforts, do not come to terms.

An effective judicial host of a settlement conference also must bring to the process a delicately balanced blend of self-assurance and humility. The self-assurance is necessary to induce the lawyers and the parties to take seriously the judge's analysis, valuation and suggestions. A judge who deprecates himself excessively, or who constantly reminds the lawyers and parties about the limitations on his knowledge and experience, can needlessly undermine his capacity to help the parties find common ground. There is little risk that the lawyers will blindly accept the settlement judge's analysis or recommendations. Instead, counsel will add the judge's views to a hopper full of other views and considerations, all of which will play roles in determining what recommendations the lawyers make to their clients during the negotiations. Given the fact that most litigators bring a well-developed sense of independence to settlement conferences, judges should not feel constrained to belittle themselves as part of an effort to avoid being unduly influential.

At the same time, it is important that judges who host settlement conferences preserve internally an accurate sense of their own fallibility. A judge who arrogantly assumes that he knows all there is to know about a case or the parties' situations, or that the only terms of settlement that are appropriate are those he recommends, is likely to provoke counterproductive reactions from counsel and litigants. Moreover, the cases are rare indeed when a settlement judge knows more about the situation than the lawyers and the parties. A good settlement judge begins the conference with an open mind, ready to learn from the people who have lived with the case for a substantial period. To be effective in this environment, a judge must take steps to ensure that the lawyers and parties perceive that he or she is approaching the settlement dynamic with an open mind, prepared to be educated, and ready to be persuaded by the side with the most compelling arguments.⁵ This perception will

4. See W. BRAZIL, *supra* note 1.

5. *Id.* at 45.

encourage the kind of behavior from counsel that is most likely to make the conference productive: using reasoning from evidence and legal authority to try to justify their client's position on the settlement issue.

The major point here is that the mind set that is appropriate for hosting a settlement conference is very different from the mind set that judges develop when presiding at trial or contested hearings. In settlement settings, the judge must be much more patient, much more open to letting the lawyers meander, both intellectually and emotionally, and much more willing to demonstrate to counsel both knowledge of the case and openness of mind. These admonitions are especially important for judges who conduct settlement conferences during breaks in busy trial or motion schedules.⁶

A style of intellectual aggressiveness that may be appropriate at trial is not appropriate for a settlement conference, especially for the early phases of such a conference. Instead of opening with an intellectual edge, the judge should open the settlement conference gently, setting a tone that is relaxed and encourages the participants to feel that the judge has not formed rigid opinions in advance. The host of the conference wants the participants to perceive him as ready to listen to each side, to be educated, and to move toward an assessment of the parties' positions only gradually, only after giving thoughtful consideration to a host of factors - some of which may have nothing to do with law or evidence. The judge hosting a settlement conference must be prepared to give the parties room to meander, time to move (emotionally and intellectually) through a series of positions and postures. A settlement conference often is like a ritualized dance: forcing the tempo ruins the effect.

It is especially important to let the parties (really the lawyers, in most instances) talk at the outset, to let them tell their side of the story, perhaps discursively, so that they feel that they have been truly heard before the judge begins forming opinions or intellectually "pushing them around." In other words, the beginning of a settlement conference is not the place for the judge to dive in and head right for the center. It is not the place for the judge to go for the jugular, as she might do in a contested hearing on a busy calendar. It is not the place for the

6. I know from frustrating personal experience that it is very difficult to shift stylistic and intellectual gears when I have been sitting on the bench most of the day, deciding contested matters, then turn to host a settlement conference. When I am on the bench I am under considerable time pressure to move through my busy docket. I respond to that pressure by becoming intellectually aggressive, forcing counsel to get right to the center of things and to efficiently explicate the key issues. I am not particularly sensitive to subtle emotional shifts and am not patient with long-winded explanations. From the outset of every hearing I use my mind assertively to control the agenda and the pace of the proceedings, to focus the issues, and to press for answers to important questions.

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judge to prove that she is in intellectual control. Instead, the judge must make the participants feel that the settlement conference is their conference, that it is geared to their needs, that the judge is a resource for them to use, and that they are not annoyances that threaten to disrupt the judge's schedule.

Thus there is a substantial difference between the tone and style a judge brings to a settlement conference and the tone and style in which she conducts most other judicial business.

To be effective, a judge must self-consciously shift into a much lower and slower gear when she moves into a settlement conference. This kind of shift is very difficult to make. Judges should not underestimate it. They should try to leave enough time between events that require such different approaches so that they can make the appropriate tonal transition.

III. TIMING SETTLEMENT CONFERENCES

There is no consensus among lawyers about the point at which a settlement conference is most likely to be productive.⁷ That lack of consensus no doubt reflects, in part, the fact that the best time for a judicially hosted settlement conference can vary from case to case, depending on a host of factors about whose dynamics little is known. There is no science in this business. Instead, judges must make difficult decisions about how much of their resources they are prepared to commit to the settlement process, then, with respect to individual cases, they must make educated guesses about when to begin the judicial effort to facilitate negotiations. The following paragraphs contain ideas that judges might consider when making such educated guesses.

At the outset, it is important to emphasize that it often takes more than one settlement conference for the parties to reach an agreement. Judges who are seriously interested in promoting settlements should expect to host two settlement conferences per case, sometimes more. A judge who makes her plans with this expectation is much more likely to schedule the first settlement conference early in the life of the case, hoping that it will bring the matter to an early, efficient resolution and knowing that even if no agreement is reached the early conference can contribute greatly to the efficiency of the case development process.

Many lawyers and judges believe that the single factor that contributes most to encouraging settlement is an imminent and fixed trial date.⁸

7. W. BRAZIL, *supra* note 1, at 77.

8. See Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 346 (1986); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253, 268 (1985).

Lawyers who believe that they can move the trial date, or that the court will be forced to move it to accommodate other cases on its docket, will not feel the same pressure to "fish or cut bait" as lawyers who know that their case will go out on the scheduled date. Thus, credible trial dates are one key to creating an environment that is conducive to settlement. A court that has decided that cost-effective use of judicial resources generally permits only one serious effort per case to help the parties reach a settlement should set its settlement conferences late in the pretrial period. At this point, the parties have completed most of their discovery, a firm trial date looms close, and perhaps the lawyers have not done their expensive, last minute preparations.

Scheduling the conference just before these eleventh hour expenses are incurred might leave additional money available for the settlement kitty. It also might reduce the odds that the parties and lawyers will become more emotionally committed to their version of the facts. To prepare psychologically for trial, litigators and litigants often "pump themselves up" during the final days of frenzied work. Once they develop these "heads of steam," it may be more difficult for them to be objective about the case and to respond flexibly to settlement proposals. On the other hand, there probably are cases in which counsel or litigants do not fully appreciate the weaknesses of their position until the imminence of the trial forces them to go through the evidence and law systematically and specifically. A judge who senses that one or more of the lawyers will not do his homework until forced to do so by the final pretrial conference or by some other last minute event should consider using part of the time set aside for that event for settlement negotiations.

Judges who are prepared to consider scheduling settlement conferences earlier in the pretrial period face the difficult task of identifying the kinds of cases or situations in which an earlier conference is sufficiently likely to be productive to warrant the effort. Settlement conferences can be "productive" even when the parties leave without reaching an agreement. Settlement conferences can save litigants money by narrowing areas in dispute and equipping counsel to tailor their discovery efforts to the real informational needs of the case. An early settlement conference can open channels of communication across party lines that can make case development more efficient. A judge can suggest new lines of inquiry or perspectives during an early settlement conference that counsel can pursue after the conference. One advantage of an earlier settlement conference is that it leaves counsel with time to respond to what they learn during the conference, such as developing information that will persuade the other side to change its position, or re-evaluating the strength of key evidence on which they would rely at trial.

When scheduling settlement conferences before the eleventh hour,

judges should look for major events whose expense could be avoided by an early settlement. It might make sense, for example, to set a settlement conference just before a series of depositions of experts, or before briefs must be filed for motions seeking summary judgment or class certification. Similarly, a settlement conference scheduled just before an expensive accounting would be undertaken might be well timed. Scheduling conferences just before major events, or just before rulings on major motions, also can be effective if the litigants are risk-averse: some people are more flexible and responsive when negotiating under a cloud of significant uncertainty. Other litigants are more likely to negotiate seriously only when the dust has cleared, that is, only when they know how the court has ruled on the key motion, or how well the competing experts testify during their depositions. For this kind of litigant, the more propitious time for the conference is right after the major ruling or event. The difficulty, of course, is distinguishing the risk averse litigants or lawyers from those who are more comfortable "dealing" in a known environment. A judge facing this quandry might offer the litigants a choice of times for their initial settlement conference, one time just before the major event, the other after the major event has been completed and a ruling issued. The option elected by the parties may offer a clue about their level of risk aversion.

Scheduling settlement conferences relatively early in the pretrial period is likely to make more sense in cases whose value is not substantial, in which the cost of discovery is likely to be out of proportion to the ultimate value of the case, or in which the amount of damages is predictable within a relatively modest range and is not likely to change significantly through time. Initial experiences with the Early Neutral Evaluation program in the Northern District of California suggest that one kind of case that is well-suited to early settlement efforts is a straightforward action on a written contract in which the damages are either liquidated or relatively easy to calculate.⁹ In these cases, the only real issue is liability and this issue often turns on relatively common-sense interpretations of language in the contracts.¹⁰ In such a situation, counsel and court should be in a position to value the case for settlement purposes without extensive discovery. If one or more of the parties claim that the terms of the written agreements were modified orally, counsel should be ready to negotiate seriously after taking the depositions of the people who have knowledge about the existence or content of the oral terms.

9. Magistrate Brazil helps administer the program. General Order No. 26, U.S. Dist. Ct., N.D. Cal., sets forth the rules.

10. Brazil, Kahn, Newman & Gold, *Early Neutral Evaluation: An Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279, 280 (1986).

In contrast, early settlement negotiations may not be feasible in cases that involve a client with serious personal injuries whose condition has not stabilized or whose effects remain unclear. If the plaintiff might require extensive additional surgery, or if his employability turns on how he responds to medical treatment or rehabilitation that has not been completed, attorneys are not likely to feel that they can fairly value the case. When faced with such a situation, the judge should pressure counsel to be as specific as possible about what additional information they need before they can value the case for settlement and when they are likely to acquire this information. The judge can then set a schedule under which the lawyers will acquire the information and fix the date of the settlement conference so that it follows promptly thereafter.

As the above examples suggest, a judge who is trying to decide how best to time a settlement conference should attempt to ascertain whether the damages aspect of the case has essentially stabilized and whether the parties have access to the other essential information they need to rationally assess the value of the case. Judges should be skeptical of generalized assertions made by counsel that they will not be prepared to discuss settlement until they have completed all of their discovery. There are a great many cases, especially those of a relatively routine nature, which counsel should be able to assess reliably with only a modest amount of discovery. Judges should push counsel to focus on the information that is central to valuing the case, then schedule settlement negotiations for a date shortly after the period required to acquire that central information. There usually is no need to wait until every last contention interrogatory has been fully answered.

IV. THE TWO-STAGE APPROACH TO DISCOVERY PLANNING

Building from suggestions made by experienced litigators, Chief Judge Robert F. Peckham of the United States District Court for the Northern District of California has developed an approach to discovery planning that is designed to prepare cases as efficiently as possible for meaningful settlement discussions.¹¹ By standing order, Chief Judge Peckham compels counsel to identify, in written statements submitted before the initial status conference (usually 120 days after the complaint has been filed), the key or core discovery that counsel need to complete in order to develop a relatively reliable valuation of the case.¹² During the initial status conference the Judge discusses the parties' various submissions

11. Peckham, *supra* note 8, and author's personal conversations with Judge Peckham.

12. *Id.* at 255. Cf. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 780 (1981).

in response to this directive; his goal is to develop a consensus about what information really is needed before serious efforts to settle the case can be undertaken.¹³ After considering the parties' proposals, he makes suggestions of his own, sometimes pointing to ways counsel can acquire or share the information they need informally and at less expense,¹⁴ sometimes suggesting that counsel may be in a position to go forward with productive settlement negotiations without first completing all the discovery they had initially outlined.¹⁵

After completing this kind of discussion, the Judge enters an order that specifies the core discovery counsel will do during the first pretrial stage and the kinds of information counsel will share informally.¹⁶ Most significantly, this order also sets the date for a settlement conference, to follow shortly after the conclusion of this first stage (core) discovery. The Judge reassures the parties that if they are not able to reach a settlement after completing the core discovery he will permit them to conduct such reasonable additional discovery as is necessary to prepare for trial.¹⁷

Thus, by working with counsel, the Judge tries to focus discovery in the first stage on the center of the case, developing the information the parties need to rationally discuss settlement but postponing the more detailed and peripheral discovery that counsel might be required to do if the case was to go to trial. This approach to structuring the pretrial period is designed to offer the litigants an opportunity to save money; it permits them to try to reach a settlement after spending only as much money on discovery as is really essential.

Chief Judge Peckham's two-stage approach to structuring the pretrial period has been used by other chambers in the Northern District of California¹⁸ and has been endorsed in the *Final Report of the Second Circuit Committee on the Pretrial Phase of Civil Litigation*, submitted June 11, 1986, by the chair of the Committee, Professor Maurice Rosenberg of Columbia University.

V. PREPARATION FOR THE SETTLEMENT CONFERENCE

A judge's effectiveness during a settlement conference depends in large part on how well prepared he is. A judge who is perceived by counsel as having a clear understanding of the case enters the process

13. Peckham, *supra* note 8, at 268.

14. Peckham, *supra* note 12, at 780.

15. Peckham, *supra* note 8, at 268.

16. *Id.*

17. *Id.*

18. Peckham, *supra* note 12, at 776.

with an important credibility edge. Acquiring this clear understanding is not always a simple task. One method is to require the parties to submit detailed written statements at least a week before the conference. A second method is to have a law clerk do some well-focused research in the relevant areas of the law.¹⁹

In most cases judges should require counsel to submit detailed settlement conference statements that give the judicial host a full sense of the environment in which the negotiations will take place. With an eye toward improving the quality of the submissions, the judges may order that such written statements be treated as confidential, not filed in the case file, and not submitted to other parties.²⁰ The judge's standard order sets forth a list of subjects the lawyers are to address in these submissions and identifies the kinds of documents or exhibits to be attached. It obviously is important to require counsel to describe specifically the evidence that supports their theory of the case and to document their damages claims. The preconference order also should explicitly require counsel to attach to their statements any documents that might enhance the productivity of the negotiations, such as contracts, key correspondence or memos, reports of experts, photographs, papers that evidence special damages and selected pages from deposition transcripts or responses to other discovery. The usefulness of the submissions about the damages aspect of the case can be enhanced by requiring the lawyers to include, when practicable, information about the settlement or judgment value of comparable cases. The preconference order also should require the attorneys to attach copies of helpful judicial opinions from other cases if difficult legal issues are likely to play a significant role in the negotiations. Counsel often will fail to bring to the conference the kinds of documents described in this paragraph unless they are clearly required to do so and many conferences flounder when analysis comes to an abrupt halt because the key materials are not available. A settlement judge who wants to help the lawyers reason toward a solution to their problems often cannot do so unless he has direct access to the basic information on which the case will turn.

The settlement conference order also should compel counsel to describe any negotiations that already have occurred, detailing demands and offers and the reasons they have been rejected. It is very important that the host of the conference know as much as possible about the history of any settlement negotiations that may already have been conducted in the case. A judge who does not appear sufficiently sensitive

19. Two sources that are useful in appropriate circumstances are *PERSONAL INJURY VALUATION HANDBOOKS* (1964) and *The Nat'l Jury Verdict Rev. & Analysis* (published monthly).

20. Author's personal experience.

to how much the parties already have offered or how much ground they already have given up can alienate them.²¹ Knowing the positions parties have taken in the past, and how much they already have moved, can be especially important when one side feels that it has demonstrated much more flexibility and good faith than the other. This knowledge also can prevent the embarrassment caused by pushing for a solution that has been considered in great detail, and rejected, in prior sessions. A judge who knows the history of the positions taken by the parties prior to the conference also is in a position to try to prevent the parties from retreating during the conference to positions that are less generous than offers or demands they made in earlier sessions. Sometimes lawyers will try to use a judge to sell a proposal that their opponents have already rejected emphatically and with good reason. Such tactics are capable of harming an unknowing judge's credibility.

A judge should attempt to understand as much as possible about the situations of the parties outside the confines of the litigation. This kind of understanding can equip the judge to suggest creative terms of settlement. Equally important, understanding the parties' situations outside the litigation enables the judge to appreciate the magnitude of the impact of various proposed solutions on the parties. Sensitivity to these relative impacts can improve the judge's relations with the litigants and can protect the judge from suggesting "solutions" that are either impossible or too painful to be practicable.

Special preparation for the conference can help with some of these potentially more difficult matters. For example, when the judge has reason to believe that limitations on a litigant's resources are likely to play an important role in the negotiations the judge should have the counsel of the litigant relay the judge's request that the litigant submit financial information to the judge in confidence and under penalty of perjury for *in camera* consideration.²² These kinds of submissions may include copies of income tax returns, bank records, loan documents, and other materials. They can be very useful in forming a recommendation about what the litigant might be able to contribute to a settlement without being forced into bankruptcy.

Since it is important to understand the procedural posture of the case at the time of the negotiations, the settlement judge's preconference order also should require counsel to identify in their written settlement conference statements the dates that have been set for trial, for discovery and motion cut-off, and for hearing on any potentially significant motions. The judge also should determine whether or not potentially expensive

21. *Id.*

22. *Id.*

trial preparation events are looming. This kind of information can be an important source of financial leverage, especially if the parties' positions on settlement end up being relatively close. The preconference order also should require counsel to attach to their statements copies of any significant orders or opinions that already have been entered in the case. Such orders can have significant implications for what parties will be permitted to do at trial and, in courts operated on the individual assignment system, may contain clues about how the assigned judge might approach important issues at trial.

Getting lawyers to submit timely and truly useful written settlement conference statements is no easy task. Even though I issue a special order well in advance of every settlement conference I host, and even though that order explicitly requires counsel to submit their confidential statements (for my eyes only) seven days prior to the date set for the conference, I often do not receive the statements until the day before the event. Many of the statements cover the mandated subjects in such conclusory terms that they are almost valueless. Finally, key documents are often unattached. The only remedies for such problems are sanctions, which may be counterproductive, or having a clerk call counsel a week before the conference and pressure them to submit substantial statements and useful exhibits. Such calls also offer good opportunities to remind counsel that they are required to bring their client, or a representative with full settlement authority, to the conference, unless the judge has explicitly permitted clients to satisfy this duty by being available by telephone during the conference.

Another important aspect of preparation for the conference involves making sure that all the people who will be necessary to conduct complete negotiations are present or readily available. This category of people includes the senior lawyers on the case, a representative of the client with full settlement authority, and a representative of the insurance carrier if the case involves insurance. Since a majority of the lawyers surveyed by the A.B.A. indicate that settlement conferences are significantly more likely to be productive if the clients are required to attend, it is important in most cases to require the clients' attendance.²³ Again, it is important for the judges to be sure that any person who appears on behalf of an insurance carrier has sufficient authority to settle the case; if the case involves a potentially large settlement, the judge may want to take special steps to ensure that the representative of the carrier is not merely a front-line adjuster, but a supervisor or vice-president. If the conference may include difficult or controversial economic calculations, the judge may require the presence of accountants or actuaries

23. W. BRAZIL, *supra* note 1, at 102-05.

who can work out proposed solutions and explain the underlying assumptions during the conference. There may even be occasions when it makes sense to have present an expert or two from some other field. If the value of the case turns on the credibility of a key percipient witness, the judge might consider arranging to have that person available so the judge can informally interview him and form an impression about how convincing his testimony will be at trial. If the depositions of key witnesses have been videotaped, the judge might find it useful to view well-edited portions of those tapes prior to or during the conference.

VI. LAWYERS' FEELINGS ABOUT THE PROPRIETY OF DIFFERENT SETTLEMENT CONFERENCE FORMATS

There are several different schools of thought on the question of how judges should structure settlement conferences. This issue can raise questions about propriety and about effectiveness. The following discussion will address this subject from both perspectives, beginning with concerns about propriety.

Responses to the A.B.A. survey suggest that a small percentage of the bar believes that it is improper for a judge to take any steps to encourage settlement.²⁴ While not widespread, this view seems to be held with considerable intensity by some lawyers (perhaps 5% of the bar).²⁵ The basis for these strong feelings, however, is not clear. No code of judicial conduct of which I am aware even intimates that judges should play no role in the settlement process. It is possible that the hostility that a small minority of lawyers feels toward judicial involvement in the settlement process derives either from a general philosophic objection to judges playing anything but the traditional passive role or from bad experiences individual lawyers have had with judges who pressured them to endorse a settlement that the lawyer thought was unfair. The judge who faces such hostility and decides to go forward with a settlement conference should acknowledge the lawyer's concerns and reassure him that he has no intention of pressuring either him or his client to do anything against their will.

More complex questions about the propriety of the judicial role arise when the settlement judge uses a format during the conference that includes private caucusing with one side or one lawyer at a time. Sensitivity among lawyers concerning *ex parte* communications with a settlement judge is by no means uniform around the country. In northern California, where private caucusing with the settlement judge is a well

24. *Id.* at 6.

25. *Id.*

established procedure in state and federal court, only a small percentage of the bar expresses concern about the propriety of this practice.²⁶ In northern Florida, however, an appreciably higher percentage of litigators question the propriety of conducting a settlement conference in this way.²⁷ Responses to the A.B.A. survey suggest that when the judge who is hosting the settlement conference will not preside at trial, only 6% of the litigators in northern California believe it is improper for that judge to meet privately with one side or lawyer at a time during the negotiations.²⁸ In northern Florida, however, about half of the responding litigators feel that private caucusing is improper in such a setting, even when the judge who is hosting the conference would not try the case.²⁹ The percentage of lawyers who challenge the propriety of private caucusing increases in both jurisdictions when the host of the conference also would preside during a subsequent jury trial if the parties failed to settle the case.³⁰ Even in this context, however, less than one in four of the northern California lawyers feel that private caucusing by the judge during the settlement conference is improper.³¹ In northern Florida, by contrast, almost half of the polled lawyers condemn this practice.³²

These regional differences of opinion do not appear to be based on differences in codes of judicial conduct. The only relevant provisions in the applicable codes are essentially identical, prohibiting "*ex parte* or other communications concerning a pending or impending proceeding . . . except as authorized by law."³³ I know of no authority, either from decided cases or from opinions issued by ethics committees, that propounds that private caucusing by a judge in the context of a settlement conference is not "authorized by law."

Regional differences of opinion about the propriety of a settlement judge meeting privately with one lawyer at a time appear to be based on differences in "local legal culture," meaning practices that have been informally established and to which the bar has grown accustomed but that are not compelled by formal rules. As indicated above, private caucusing by the settlement judge is a well-established practice in the state courts of northern California, and the results of the A.B.A. survey indicate that lawyers in that region now heartily endorse this practice.³⁴

26. W. BRAZIL, *supra* note 1, at 107.

27. *Id.* at 108.

28. *Id.* at 74.

29. *Id.*

30. *Id.* at 107.

31. *Id.*

32. *Id.* at 72.

33. MODEL STANDARDS, CODE OF JUDICIAL CONDUCT, Canon 3, §A(4) (1984).

34. W. BRAZIL, *supra* note 1, at 73. In fact, when I host settlement conferences, I often ask the lawyers to choose the structure they would like to use, and they virtually always opt for private caucusing.

The differences between northern California and northern Florida in local legal culture may have their roots, in part, in one important difference in the way the state courts are operated in the two regions. In northern California, most of the state courts are run under the master calendar system.³⁵ Under that system, different aspects of the cases are handled by different judges.³⁶ Thus, the judge who handles pretrial law and motion does not preside at trial. Similarly, the judge who is assigned to host the settlement conference would not preside at trial if the case went that far. In Florida, however, most of the state courts operate under the individual assignment system.³⁷ Promptly after being filed each individual case is assigned to an individual judge, who is responsible for handling all aspects of that case from initial status conference through trial.³⁸ Moreover, the Florida courts have not developed a system for sending settlement conferences to specialist settlement judges or to judges who will have no other contact with the case.³⁹ Thus, in most of the state courts in Florida, the judge who hosts the settlement conference is also the judge who would preside at trial. This fact makes both judges and lawyers less comfortable with the assigned judge holding secret meetings with one side at a time, even under the rubric of settlement negotiations. In such an environment, private caucusing creates the risk that the judge who will preside at trial will learn things in the secret sessions that would be inadmissible under the rules of evidence and that might influence rulings that might be made at the trial. This risk does not exist in most of the California courts, in which the settlement judge has no other contact with the case. This fact may help to account for the substantially greater enthusiasm that litigators in northern California feel for settlement conferences that are structured around a series of private caucuses.

Obviously, judges should be sensitive to expectations in the local bar, especially if these expectations are the product of long-established practices of local courts. A judge who is considering using a procedure to which the local bar is not accustomed should explain that he is aware that the procedure he would like to use is not well established locally and may give rise to some concern, but then should go on to explain why he would like to experiment with the procedure, specifically pointing out the benefits or advantages it promises for the lawyers and their clients. A judge in this situation also should explain that the procedure

35. W. BRAZIL, *supra* note 1, at 72.

36. *Id.*

37. FLA. STAT. ANN. §43.26(2)(a) (West 1974).

38. *Id.*

39. *Id.*

he contemplates has been used successfully in other parts of the country, where lawyers are enthusiastic about it.

VII. COMPARING THE EFFECTIVENESS OF DIFFERENT SETTLEMENT CONFERENCE FORMATS

A. *Private Caucusing: One Lawyer at a Time*

Having experimented with three different formats for settlement conferences, and having discussed the matter with lawyers with wide experience in settlement negotiations, I have concluded that the structure that is likely to be most productive in the widest range of circumstances revolves around a series of meetings in which the judge confers privately with one lawyer at a time. Successful conferences often involve more than these private caucuses. The judge may open the conference by meeting briefly with all counsel and parties; he may call the lawyers together at various junctures during the negotiations; he may meet privately with a lawyer and client; and he may close the conference with a group meeting. But most of the real work is likely to be done, and most of the progress is likely to be made, in the private caucuses involving the judge and the lawyer(s) for one party or side. The following paragraphs set forth the explanation of the view that the private caucusing system is the most productive of the commonly-used formats for judicially hosted settlement conferences. They will also describe the principal advantages and disadvantages of other settlement negotiation structures.

When a settlement judge meets privately with one lawyer at a time, he can set an informal tone and can encourage counsel to interact with him as an intellectual peer. He can encourage counsel to relax and to discuss the case and the settlement possibilities more openly and more frankly than would be likely if his client or opposing counsel were present. Many lawyers feel increased pressure to "perform" or to "posture," or to "play tough," when their client or their adversary is watching. Litigators understandably want their clients to feel that they are getting their money's worth.⁴⁰ They also want opposing counsel to view them as competent and confident, as vigorous advocates and demanding negotiators.⁴¹ For these reasons, litigators generally do not like to make concessions about the merits or value of the case in the presence of opposing counsel.⁴² By meeting privately with one lawyer at a time, a judge can reduce these obstacles to productive settlement discussions.

40. Author's personal experience.

41. *Id.*

42. *Id.*

A lawyer who is meeting privately with the judge is likely to be more flexible and less verbally ornate. Moreover, discovery and other pretrial activities can generate frictions or animosities between lawyers that can interfere with settlement negotiations. One of the virtues of the private caucus system is that it minimizes interaction between opposing counsel, thus limiting the adverse effects on the process of bad blood between lawyers or between a client on one side and a lawyer on the other.

When meeting outside the presence of the clients, the judge and counsel can converse efficiently in vocabulary that a layperson would not understand. If the client were present, counsel and the court would feel the need to go more slowly and to explain terms of art, so as not to alienate or be rude to the client. Thus, a judge who meets privately with one lawyer at a time is likely to have better access to each party's real view of the case and can move more efficiently through the various subjects that need to be covered.

Another significant advantage of the format of meeting privately with one lawyer at a time is that it permits a lawyer who is having client control problems or who knows that his client is especially sensitive to or concerned about certain matters to alert the judge to these difficulties and, where appropriate, to enlist the judge's assistance. A lawyer is not likely even to intimate that these kinds of problems exist in a meeting that is attended by his client or by opposing counsel. Yet special client sensibilities, or unreasonable recalcitrance by clients, can become major obstacles to successful settlement negotiations. The results of the A.B.A. survey indicate that most lawyers have difficulties with unreasonably recalcitrant clients in a relatively small percentage of their cases (about half of the responding litigators said they encountered this problem in less than 10% of their cases).⁴³ But since only a small percentage of all filed cases go all the way to trial, it is possible that unreasonable clients account for a large percentage of the failures to reach settlement. It is important to alert a judge who is dealing with a case in which this kind of problem plays a part so that he can adjust his approach to work more with the client, to attempt to gain his confidence, and to be sure not to take steps that alienate him or leave him confused or defensive. The results of the A.B.A. survey suggest that client control problems are more likely to surface when the parties are natural persons (as opposed to corporations or other institutional litigants) and when the lawyers are younger and less experienced.⁴⁴ Judges who host settlement conferences involving these kinds of litigants or lawyers might give special consideration to using the private caucusing system.

43. W. BRAZIL, *supra* note 1, at 99.

44. *Id.* at 100.

The private caucusing system also can offer the advantage of shielding clients from the "bartering" tone that sometimes takes over the negotiation process, especially in its later stages. Many clients accept the horse-trading aspects of settlement negotiations, but some can be offended when they see this kind of exchange taking place within the judicial system.⁴⁵ By meeting privately with one lawyer at a time, the host of the conference reduces the risk that sensibilities will be offended by a process that some clients may feel is appropriate only in used car lots.

The lawyers are not the only participants who can be more frank when the host of the conference uses the private caucusing system. The judge, too, can be more forthright. She can ask questions that she could not ask in the presence of others. She can be more assertive in directing the discussions and less concerned about preserving appearances. After the judge has probed more vigorously and in areas she might shy away from if clients or opposing counsel were present, she can articulate her own analysis and express her own valuation more openly. This permits the judge to use her time in the conference more efficiently and reduces the likelihood that the lawyers will be forced to guess at what the judge really thinks about the relative strengths of the parties' positions and the relative reasonableness of the positions they are taking with respect to settlement.

Another advantage of the private caucusing system, is that it reduces the odds that one or more of the lawyers will be embarrassed in front of his client by the judge's analysis or her questions or comments. This kind of embarrassment can arise in several different ways. The judge may offer a well-reasoned analysis, for example, that is both different in result and obviously more compelling than the analysis that counsel has developed for his client. Or the judge may make comments that are inconsistent with what counsel earlier told his client about the case. Similarly, the judge might ask important questions about the relevant evidence or law that counsel cannot answer. In addition, the judge might ask why key documents were not brought to the conference or why key materials that could have made the conference more productive were not developed.

An example of such "lawyer-embarrassment" occurred in a conference I hosted a year or so ago. In a meeting with a lawyer and his client, I asked counsel to give me the figure for the present value of his client's future damages. The lawyer had not converted the future figures to present value and was unable to do so in response to my question, nor had he explained the concept of present value to his client. When these

45. Author's personal experience.

basic failures in preparation were exposed (inadvertently, on my part) in front of his client, the lawyer was embarrassed and suffered a serious loss of credibility with the person who was paying his bills.

These kinds of embarrassments in the presence of clients can damage prospects for settlement in two ways. The first is obvious: a party is less likely to agree to a settlement if his confidence in the advice he is receiving from his lawyer has been shaken during the conference. The second is less direct: embarrassed lawyers may become more defensive or pugnacious in efforts to cover their errors or to recapture their client's lost confidence. As an attorney becomes more defensive or pugnacious, the likelihood that a settlement conference will be successful plummets. Thus, one important advantage of private caucusing with the lawyers lies in the fact that it reduces the odds that the judge's questions or analyses will inspire counterproductive reactions in the lawyers.

To summarize, private caucusing with one lawyer at a time (1) can lead to more frank and open discussions, (2) can be less threatening to counsel, (3) permits the participants to be more flexible, (4) can give the judge access to sensitive information about parties that would otherwise remain hidden, and (5) creates opportunities for more efficient, less postured expositions of evidence and law. In private meetings, the judge is likely to get closer to the parties' true feelings and positions in less time than in any alternative format.

Private caucusing is not a panacea. It does not convert adversaries into allies. It does not eliminate posturing and dishonesty. It does not free the settlement process of the overlay of disingenuous ritual that can try judicial patience and abort even the most conscientious efforts to help parties find common ground. Judges who use this format will find that lawyers continue to dissemble, exaggerate, and maneuver for advantage. The promise of private caucusing is not to eliminate these negative forces, but to reduce their sway.

Private caucusing can create problems for the settlement dynamic that do not arise when a judge uses one of the traditional group formats for the conference. The following section contains a discussion of these potential problems.

B. Group Meetings: Counsel and Parties or Only Counsel

The one great advantage of conducting a settlement conference in the group meeting format, with all counsel and all parties present, is that this practice essentially eliminates the suspicion and anxiety that can be inspired by secret meetings between the judge and one lawyer or one side at a time. Some litigators are uncomfortable with a judge using the private caucusing system in a settlement conference because they fear that the judge and their opponents may strike secret deals or

otherwise conspire to foist an unfair settlement on their client. These litigators do not trust the judge to be even-handed; even though they, too, would meet privately with the judge in this caucusing system.⁴⁶ In addition, some litigators do not want the settlement judge to know things about the case that they do not know.⁴⁷ Some lawyers also believe that it looks unseemly for a judge to hold secret meetings with one side to an action.⁴⁸ Concerned about appearances, these lawyers feel that secret meetings with one side at a time are inconsistent with their idea of the role that should be played by the detached neutral judge in our system.⁴⁹

To some extent, feelings of this kind are understandable when the judge who hosts the settlement conference also is the judge who would preside at trial if the case went that far. These concerns are quite understandable in non-jury cases and in a system in which the *settlement* judge subsequently shared with the *trial* judge the information he learned and the feelings he developed during the settlement negotiations. But if the judge who hosts the conference will have no other contact with the case, and if he will preserve the confidentiality of what he learns during the negotiations, it is difficult to understand why his meeting privately with one side or lawyer at a time is objectionable or unseemly. An objection based on the fact that the conferences are not open to the public and are not on the record would apply equally to every kind of settlement conference, even those in which the judge meets simultaneously with all counsel and parties. Such a broad objection to the fact of confidentiality flies in the face of the public policy that is reflected in Federal Rule of Evidence 408 (and its state law analogues), which encourages private, voluntary efforts to settle disputes by prohibiting parties from introducing settlement communications at trial for the purpose of proving liability or the amount of damages.⁵⁰

46. Learned while conducting interviews for ABA survey: *Litigator's Views about Appropriate Roles and Effective Techniques for Federal Judges* (1985).

47. *Id.*

48. *Id.*

49. *Id.*

50. Federal Rule of Evidence 408:

Compromise and Offers to compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

HOSTING SETTLEMENT CONFERENCES

Objections based on fear of judicial corruption seem wholly unfounded. There is no empirical evidence that would support the fear that judges in such settings abuse their knowledge or status by conspiring with one side to take advantage of the other. To engage in such practices would do great violence to a judge's oath of office and to his professional identity. There would have to be a compelling incentive to induce anyone to inflict this kind of damage on himself, and it is difficult to imagine what this incentive might be for a settlement judge. It is important to bear in mind that in a settlement conference a judge has no formal power. He cannot force anyone to accept anything. He is useful only to the extent that he is persuasive, and he is persuasive only to the extent that he retains personal credibility and to the extent that his views are well-reasoned. Because a settlement judge does not have the power to compel any particular result, and because both parties must voluntarily accept the terms of any agreement that might emerge from a conference, there is virtually no incentive for corruption. There certainly is less incentive for corruption in this setting than there is at trial or on appeal, when judges have real, formal power. Yet there is almost never corruption even in these more tempting situations. Thus it is hard to take seriously an imagined fear that corruption could enter the settlement conference arena.

FED. R. EVID. 408.

Florida Rule of Evidence §90.408:

Compromise and offers to compromise

Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise, is inadmissible to prove liability or absence of liability for the claim or its value.

FLA. R. EVID. §90.408.

California Evidence Code:

§1152.5. Mediation

(a) Subject to the conditions and exceptions provided in this section, when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute:

(1) Evidence of anything said or of any admission made in the course of the mediation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

(2) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any civil action in which, pursuant to law, testimony can be compelled to be given.

A different and more significant source of resistance to private caucusing might be fear that a lawyer will communicate false or misleading information to the judge during a confidential session and that the judge will rely on that information in forming recommendations about terms of settlement. Some lawyers might fear that private caucusing destroys the system of intellectual and ethical checks and balances that inheres in the adversary system. These lawyers might perceive a danger that a settlement judge might unknowingly abuse his power of persuasion by advocating terms of settlement that he feels are reasonable only because he has accepted certain false information that he was given in a private session in which opposing counsel had no opportunity to challenge and correct the information. Judges should acknowledge that there is some basis for this fear and should take steps to ensure that their reasoning is not compromised by false information. The best protection against this danger is for the judge to spell out, to each lawyer, the full basis for the reasoning that supports any recommendation he makes.

(b) Subdivision (a) does not limit the admissibility of evidence if all persons who conducted or otherwise participated in the mediation consent to its disclosure.

(c) This section does not apply unless, before the mediation begins, the persons who agree to conduct and participate in the mediation execute an agreement in writing that sets out the text of subdivisions (a) and (b) and states that the persons agree that this section shall apply to the mediation.

(d) This section does not apply where the admissibility of the evidence is governed by Section 4351.5 or 4607 of the Civil Code or by Section 1747 of the Code of Civil Procedure.

(e) Nothing in this section makes admissible evidence that is inadmissible under Section 1152 or any other statutory provision, including, but not limited to, the sections listed in subdivision (d). Nothing in this section limits the confidentiality provided pursuant to Section 65 of the Labor Code.

(f) Paragraph (2) of subdivision (a) does not limit either of the following:

(1) The admissibility of the agreement referred to in subdivision (c).

(2) The effect of an agreement not to take a default in a case pending civil action.

(Added by Stats. 1985, c. 731, p.—, §1.)

CALIF. EVID. CODE §1152.5 (West 1985).

Minnesota Rule of Evidence 408:

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

MINN. R. EVID. 408.

Another source of discomfort with private caucusing may simply be that in some parts of the country settlement work has not been done this way by judges in the past. In some locales, private caucusing is out of sync with traditional mores. So it is greeted with suspicion and resisted.

If the source of the discomfort with private caucusing is unfamiliarity, a judge might be able to gain the participants' confidence in the process by explaining its rationale and by emphasizing that it has been extensively and successfully used in other parts of the country. But if the source of the discomfort is deeper than unfamiliarity, or if explanations and reassurances fail to overcome suspicions, the settlement judge might be well advised to opt for a procedure that is familiar and that will not inspire emotional reactions that could interfere with negotiations. Needless to say, settlement judges must work with the people and the situations as they present themselves at the time of any given conference. If one or more of the lawyers or parties is deeply apprehensive at the prospect of the settlement judge holding private conversations with one attorney or side at a time, an attempt to force that format might well backfire. In such circumstances, the judge may be able to contribute to the settlement dynamic only if he meets with everyone in a group setting.

Unfortunately, the group format has significant limitations and calls for a special level of diplomacy by the judicial host. In private caucusing, the settlement judge can be more frank; he need not worry about embarrassing a lawyer or litigant in front of the others. He also need not worry about how each lawyer's analysis of the case or articulation of his client's position will affect other lawyers or parties. In the group format, however, there is a real risk that the participants will offend each other or that assertiveness by one will make the other defensive, thus encouraging each participant to take a more extreme position and

Ohio Rule of Evidence 408:

Evid R 408

Compromise and offers to compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

OHIO R. EVID. 408 (Adopted eff. 7-1-80).

damaging the chances of ultimately reaching an agreement.

In one group session (attended by lawyers and clients) that I hosted some time ago, one side managed to thoroughly insult the other by presenting an analysis of the case and a settlement proposal that was patently unreasonable. The conference was worse than a complete waste of time; it drove the parties even farther apart. If the judge has no opportunity to meet privately with each side before the group meeting, he will have no opportunity to assess the reasonableness of each litigant's position and no capacity to move them closer to common ground before they confront each other. And after a party has taken a position in front of the others in a group setting, it can be much more difficult to persuade him to make a change. Parties and lawyers often will have invested too much "face" in the stance they have publicly taken to be prepared to "retreat" to a compromise position.

To reduce the likelihood that the participants will paint themselves into corners from which they may feel they cannot escape without an intolerable loss of face, the host of the group session often will be tempted to discourage participants from offering specific analyses and proposals. Instead, the host will try to facilitate the settlement dynamic by keeping the discussion at a general level and encouraging counsel to communicate their client's views through oblique signals rather than through straightforward expositions or proposals. Thus the group meeting format can lead either to studied circuitry or to intensified posturing and exaggeration. Neither circuitry nor posturing promotes the kind of careful, detailed, straightforward analysis that is essential to rational searches for fair terms of settlement. Thus the group meeting is likely to be successful only if the parties come to the conference with similar views about the value of the case and do not provoke each other during the course of the discussion to adopt more extreme positions.

The risk that counsel will dissemble or exaggerate because of the presence of the opposition tends to undermine what might otherwise be a significant advantage of the group meeting format. In the group setting, each party hears directly what the other parties have to say. Thus each party has direct access to the other parties' analyses and to the proposals they make for settling the case. Misleading or erroneous statements made by one side can be challenged and corrected by the other. Moreover, there is no risk that important points will be lost or misunderstood because of errors or omissions by the judge as he shuttles from side to side. This format also eliminates the risk that a lawyer will not communicate an offer or demand to his client, or will unintentionally distort it when he transmits it. In some settings, these advantages can be significant. For example, if the settlement judge believes that one or more of the lawyers does not understand the case well and is not likely to communicate accurately the opposition's analysis

or proposals, the group meeting creates an opportunity for the lawyer on one side to speak directly to the client on the other side.

I must add, however, that in a conference I hosted not long ago one of the lawyers perceived this as a purpose of the group meeting and deeply resented it. He became very angry, accusing the court of using the format of the settlement conference to interfere with his relationship with his client. The intensity of his reaction intimidated his client and doomed the negotiations. It may well be the case, however, that the lawyer reacted this way because he considered the group meeting to be a deviation from the norm of private caucusing, which has become the standard format of settlement conferences in our region. Moreover, we used the group meeting after a series of private caucuses had failed to move the parties closer together and at the suggestion of a lawyer who felt that his messages were not being delivered to the client on the other side. At the group meeting, only one side made a substantial presentation; the opposition played the role of the audience, not being prepared to make a comparable counterpresentation. Thus there was considerable imbalance in the process. All of these factors probably contributed to the intensely hostile reaction of the lawyer who represented the client at whom the presentation during the group meeting was aimed.

It must be emphasized that the value of structuring the conference so that the two sides can communicate directly with one another depends in large measure on the quality of what will be communicated. If parties (really lawyers) are likely to intensify their posturing and their exaggeration when they communicate directly and in the presence of clients, the value of direct communication is compromised because what is being directly communicated is not what anyone really thinks. Moreover, proposals the parties would in fact accept, or at least seriously consider, are never made because each side is preoccupied with not appearing "soft" to the other. Thus the group format actually can make it more difficult for the parties to learn one another's true positions.

On the other hand, the group meeting offers one advantage that can be consequential to litigants or lawyers who are especially distrustful of others or who lack confidence in their own analysis of the case. In the group setting, every participant knows every piece of information that gets to the settlement judge and that affects his recommendations or valuations. Some people feel better equipped to assess the value of recommendations from their judicial host when they know all the information on which he bases these recommendations. This knowledge also may increase some litigants' confidence in the impartiality of the settlement judge. These psychological effects of an "open" process could be significant in some settings, such as when one or more of the litigants is new to the adjudicatory system and is especially fearful that someone

will take advantage of him. For some parties, an open process may be the only kind that can instill the confidence that is essential to reaching a compromise agreement.

Unfortunately, the "openness" of the process is often illusory. Parties who participate in an "open" exchange probably feel more pressure to perform in front of the opposition and to leave themselves room to maneuver; as a result, they are likely to put extra distance between what they say and what they really think. Thus, while it is true that in an open session everyone knows what all the cards in the judge's hand are, those cards may have little to do with the realities of the case or with the positions the parties ultimately would take on the settlement questions. In short, the openness of the system seriously compromises the quality of the information that reaches the judge.

By compromising the quality of what the judge knows, the process compromises the value and reliability of his opinions. Experienced settlement judges will know that what they are being told in this kind of setting most likely represents only the tip of the informational iceberg. Conscientious judges may respond to this ignorance by playing passive roles or by offering only the most general, abstract reactions to the case. Thus their inputs will not be analytically penetrating and will not be especially useful. This fact may not be of great consequence in small and simple cases, in which there is little room for reasonable minds to disagree about values and in which the judicial role is simply to provide a forum for exchanges by the lawyers. But in more complex matters the quality of the settlement judge's contributions depends on the quality of the information the lawyers share with the judge. The litigators who responded to the A.B.A. survey made it very clear that what they want most from a settlement judge is the expression of an informed, analytical opinion.⁵¹ These litigators feel that it is through such opinions that judges can contribute most to the settlement dynamic. Given this fact, judges should opt for the settlement conference format that maximizes the quality of the information they receive and thereby maximizes the reliability of the opinions they form. In most situations, that format is private caucusing, not open meetings.

Some of the most intense pressures that attend the open meeting format can be reduced by limiting participation to lawyers. Unfortunately, excluding clients does not alter the fact that contributes most to the posturing and to the distortion of the flow of information: the presence of the adversary. The quality of what is communicated to the settlement judge remains seriously compromised (except in the simplest of cases) as long as the opposing sides make presentations in front of

51. W. BRAZIL, *supra* note 1, at 2.

one another. Thus, the use of at least some private caucusing in all cases of any subtlety is advisable.

In the group session format, there is a greater risk that information about the parties' true positions on terms of settlement will be distorted than information about the evidence on the merits of the case. This is because in most cases each lawyer is in a much better position to attack and counterbalance what the other lawyers say about the evidence than what they say about the terms of settlement that their clients might be willing to consider. Thus judges might consider use of the group meeting format to discuss the evidence, then turn to private caucusing to explore the terms on which parties might agree to settle. Unfortunately, in such a "bifurcated" approach lawyers may make each other angry in the group session by the ways they argue the evidence, or may take positions about what the evidence is, or what it signifies, that make it very difficult to be flexible when they discuss possible terms of settlement in private with the judge.

C. One Version of a Hybrid Structure: The Judge-Led Group Session Followed By Private Caucusing

Two highly regarded settlement judges in northern California, the recently retired Francis Mayer of the Superior Court of the City and County of San Francisco, and the late Magistrate Richard Goldsmith of the United States District Court for the Northern District of California, developed a format for settlement conferences that incorporates both a group session and private caucusing.⁵² Since both of these judges worked under the master calendar system, they would not preside at trial if their settlement efforts did not result in an agreement.⁵³ That fact gives the settlement judge more freedom to become intensely involved in negotiations than he would feel if he were expected to preside at a trial in the event the case did not settle.

Judges Mayer and Goldsmith typically open their settlement conferences by hosting a group session attended by all counsel, but not by the parties.⁵⁴ At this session the judge does not ask the lawyers to make presentations and does not solicit their analyses or ask them to describe their client's positions on settlement.⁵⁵ Instead, the judge himself opens the meeting by describing, in narrative form, his understanding of the facts of the case.⁵⁶ To prepare this presentation, the judge draws on

52. The author has spoken with attorneys who have appeared before Judge Mayer and judicial colleagues. The author has spoken with Magistrate Goldsmith about his conference techniques and has attended seminars taught by Magistrate Goldsmith.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

materials available in the file and on the written settlement conference statements the parties have submitted.⁵⁷ At the close of his presentation, he permits counsel to offer specific corrections, but he does not permit extended debate about contested issues and does not invite the lawyers to respond with their own versions of what happened.⁵⁸ To make sure the conference is well focused analytically, and that subsequent negotiations are not compromised by serious misunderstandings, he might list the key issues that the parties dispute and the significant matters on which they agree. This procedure can increase the efficiency of the subsequent private discussions between the judge and counsel.

After completing his narrative of the facts, and noting corrections suggested by counsel, the judge shifts formats and begins a series of private meetings with one lawyer at a time.⁵⁹ In these confidential sessions, he explores the strength of the evidence and law that supports each litigant's position and points out weaknesses or problems that might justify movement toward common ground.⁶⁰

This hybrid format has several advantages. Lawyers who have had conferences with Judges Mayer and Goldsmith report that their factual narratives establish their credibility at the outset.⁶¹ These narratives demonstrate that the judge is taking the settlement conference seriously, that he is well prepared and has a formidable grasp of the case, and that he is no intellectual slouch. By leading off with his own narrative account of the facts, the judge is able to occupy the pivotal factual ground at the outset, leaving counsel with little room to try to manipulate his perception of the basic predicates of the suit. By stating the facts himself, instead of asking each side to present its version, the judge dramatically reduces the opportunities counsel otherwise would have to exaggerate, posture, puff, and antagonize one another. He also avoids the lengthy excursions into only marginally relevant material that accompany many lawyers' presentations. His narratives focus the lawyers' attention on the central aspects of the case and give him a chance to identify the parts of the case he considers most important and thus most worthy of detailed attention during the private caucuses. Moreover, the opportunity he gives the lawyers in the group session to correct mistakes in his factual narrative serves as an excellent vehicle for identifying the significant factual matters that are in dispute.⁶² Drawing

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Magistrate Claudia Wilken of the United States District Court for the Northern District of California, who uses the procedure described in the text, reports having had this experience in several cases.

on the written settlement conference statements submitted by the lawyers prior to the conference, the judge occasionally exposes areas of disagreement that counsel had not yet identified. Thus the opening session equips both counsel and the court to move expeditiously to the center of things in the private caucuses.

By exposing his perception of the facts to all counsel at the outset, the judge also reduces fears that he might predicate his ultimate settlement valuation on a misperception of some important aspect of the case. Knowing what assumptions the judge is making about the key facts of the case, the lawyers will be less worried that the judge's recommendations about settlement have been contaminated as a result of someone's selling him, during one of the private caucuses, a self-serving and very questionable version of a key fact. Thus the opening group session can dispel some of the apprehensions counsel might otherwise feel about the consequences of what goes on behind the closed doors of the one-on-one meetings.

There is much to commend the approach developed by Judges Mayer and Goldsmith. It seems to offer the best of both settlement conference worlds: the reassurance of the open session and the relative candor, flexibility and efficiency of private caucusing. Unfortunately, there also are significant disadvantages to this settlement conference format. From the perspective of the judge who will host the conference, the most obvious drawback is the amount of preparation required to develop a credible narrative in all but the simplest of cases. Many judges who are called upon to host settlement conferences simply do not have the time to master the file and the parties' preconference submissions to the degree that would be required to prepare a solid narrative of the facts in the action. A weak, thin, equivocal, or inaccurate narrative by the judge at the outset of the conference would jeopardize his credibility and thus his effectiveness as a facilitator.

Unless presented with great sensitivity, an opening narrative also risks creating the impression in the lawyers' minds that the judge has prematurely formed opinions about key issues or has taken sides before permitting each litigant to present its position in some detail. A judge who gives counsel the impression that he is closed-minded, too quick on the analytical trigger or biased in favor of one party is likely to be virtually useless in settlement negotiations.

Judicial hosts of settlement conferences also must be wary of reinforcing some lawyers' feelings that judges are much more interested in getting cases off their dockets than in being sure that the terms of settlements are fair. A judge who presents a factual narrative superficially, with apparent disdain for details or subtlety, or in a manner that seems calculated to gloss over or power through disputes on potentially significant issues, encourages counsel to infer either that he is an

intellectual lightweight whose opinions are valueless or that he is so preoccupied with pressing for a settlement that he cannot be trusted to offer reliable recommendations.

There is another, somewhat more subtle difficulty with the approach that calls for the judge to open with a factual narrative. In all but the simplest of cases, even a judge who prepares conscientiously for a settlement conference is not going to know as much about the underlying facts and circumstances as the lawyers who have lived with the dispute through pretrial motions, investigations, and discovery. A judge who "takes charge" of the factual setting by presenting his own narrative account at the outset leaves himself less room to learn from the parties. I have learned, painfully, that it is easy to overestimate one's understanding of the situation, even in those cases when I have devoted considerable time to preparing for the conference. Moreover, the judge's preconference understanding of the evidence can be no better than the lawyers' preconference understanding of it. Yet I have found that the lawyers' understanding often deepens or changes during, and because of, their interaction with each other and with the judge in the settlement conference. Questions posed by the judge, or perspectives offered by an opponent, often lead attorneys to point to evidence or information they had not focused on before. Thus the settlement negotiations take on a dialectical quality, and it is through this dialectic that the lawyers' and the judge's analyses of the case mature and become more reliable. A judge who begins a settlement conference with an assertive factual narrative risks cutting off the dialectical process prematurely, and thus risks deceiving himself into thinking he understands the case when in fact he does not.

The format for settlement conferencing described in the next section reduces some of the risks just described.

VIII. A DETAILED ROADMAP FOR CONDUCTING A SETTLEMENT CONFERENCE USING THE PRIVATE CAUCUSING FORMAT

This section describes with considerable specificity one way to structure and conduct a settlement conference. The methods described in this section are not always appropriate or superior to others. Individual judges must fashion approaches that suit their own personalities and styles. I hope, however, that even judges who prefer a quite different format and approach will find some of the ideas in this section useful.

In thinking about what takes place during a settlement conference it is helpful to divide the process into four conceptual dimensions:

1. tone and style (set initially through an introductory "speech");

2. presentations by the lawyers;
3. analysis (a dialectical process between judge and counsel and, through the judge, between counsel);
4. negotiations.

In the real world, these dimensions overlap and are interrelated.

A. Tone and Style

1. *Location of the Conference.* Most of the serious negotiations in a judicially hosted settlement conference should take place in chambers. My pattern is to open the conferences with brief introductions of people and procedures at a group meeting attended by all in my courtroom. Then, when I meet privately with one lawyer or one side at a time, I take the person(s) involved into my chambers. I do not like to make the people who are not talking to me wait in the corridor; lawyers seem to become comfortable with corridors, but making clients wait there is impolite and invites disrespect for the settlement process itself. I invite everyone to wait in my courtroom, where they can talk among themselves or review materials related to the conference.

There are several advantages of structuring the conference so that the participants are at various times in the courtroom and in chambers. Assembling as a group in the courtroom at the outset forcefully reminds everyone where they will be if they do not settle the case. The formality of the courtroom also encourages people to take the conference seriously and to behave respectfully. In contrast, conducting the private substantive discussions in chambers encourages a sense of intimacy and informality that may make the participants more open with you during discussions and more flexible during negotiations. It is by no means true, of course, that meeting privately in chambers eliminates all posturing and converts all lawyers and parties into paragons of virtue and reason. But being in chambers tends to create a more relaxed atmosphere and makes some people feel that they have been admitted to the inner sanctum. This atmosphere and these feelings can help reduce the defensiveness, combativeness, and rigidity that litigation fosters and that interfere with efforts to reach a settlement.

At the close of the conference, I reassemble all participants in the courtroom, either to confirm in court, and on the record, that an agreement has been reached; or to report, at least at a general level, the status of the negotiations, to plan next steps, and to thank everyone for the work they committed to the process. Because some attorneys fear that they might have offended the judge if they did not reach a settlement, or if they disagreed with the judge's valuation of the case, it is a good idea for the judicial host, at the close of the conference,

to thank everyone for their efforts and to reassure them that he understands that reasonable people can disagree about these kinds of cases and that no one should feel that the host of the conference bears them any ill will or would hold anything against them in any proceedings down the road.⁶³

2. *Introductions.* Just before the conference is scheduled to begin, the judicial host should review the settlement conference statements the parties have submitted, any notes she has made from them, and any other material she or her law clerk has developed in preparing for the event. The judge, as the host of the conference, needs to know the names of the lawyers and of the people who will represent the parties during the negotiations. The judge should assemble the lawyers and parties in one room and begin the conference by making introductions and by explaining the procedure that will be used. Upon entering the room, the judge should shake hands with each lawyer and party, addressing each by name. The seemingly inconsequential act of addressing the participants by name can be very helpful. It signals to everyone that the judge has prepared well and helps set an appropriate tone, suggesting that the judge does not want the conference to be dominated by the remoteness and formality that is often associated with interactions with a judge in open court.

When introducing himself, the judge should make sure that all the lawyers and parties have been introduced to one another. This is another small step that can help encourage a sense of respect and connection between people. It also helps, albeit modestly, to break down some of the fears, hostilities and rigidities that people in litigation experience, especially when they are in the courthouse.

After the personal introductions, the judge should describe and explain the format of the conference and the role he will play in it. This brief statement about the procedure is extremely important. Lawyers from other jurisdictions may not be accustomed to the private caucusing method and may be taken aback by it unless it is explained. The risk of alienating clients is even greater. A judge cannot safely assume that the lawyers will have explained to their clients how he structures his conferences, and why. Since few lay people expect judges to hold secret meetings with one lawyer at a time, and since the clients will be excluded from these meetings at least for the first round of discussions, it is imperative that the judge explain how the process will work and apologize for not including clients at all stages.

These initial explanations of the procedure are important to clients. On more than one occasion I have either failed to explain the process,

63. Attributable to Aaron Pothurst, Esq., of Miami, Florida.

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or have offered only the most cursory statement, then have proceeded to thoroughly alienate the clients by moving in and out of private meetings with lawyers for hours, essentially ignoring the people whose case it is. In one conference, the client, a senior executive with a local corporation, interrupted my self absorbed shuttle diplomacy by announcing that since it was obvious that he was not needed, he could not understand why the court had ordered him to be present and that he was leaving. After I scurried to mend the courtesy fences, he reluctantly agreed to stay, but he remained openly resentful and aggressively wrested away from his lawyer control over the remainder of the negotiations. In fact, his lawyer sat moot for the rest of the session, with his eyes fixed on the floor.

In another case, a client who had been left for a couple of hours to watch counsel and me move in and out of closed sessions vented his sense of frustration and powerlessness at the closing group meeting by making a long, emotional, and internally contradictory statement, obviously acting well beyond his lawyer's control and not helping his cause. Judges who host settlement conferences have a duty to try to reduce the feelings that provoke this kind of acting out. One method is to interrupt protracted periods of private caucusing with short group sessions in which the judge reports on the status of the discussions at a general level to the clients, and reassures them that this apparently strange procedure is designed to maximize the likelihood that a fair resolution of the dispute can be reached.

A few words are in order here about the content of my introductory remarks. They need not be lengthy. I usually open by describing the private caucusing system that I normally use. After explaining its rationale, I ask the group as a whole whether there is some other procedure that would be better suited to the situation or the case in question. Occasionally a lawyer will suggest that all counsel participate in the first substantive discussion, or that he be permitted to bring his client to the first private caucus, but in the vast majority of cases everyone is content to use the suggested procedure.

In my introductory remarks, I explain that I have conducted a great many settlement conferences and have found that they tend to be more productive if, at least in the beginning, I meet with one lawyer at a time. I go on to explain that I have found that counsel tend to posture somewhat less when they meet with me in private, and that for that reason we can cover ground more quickly and can learn more about each side's view of the case and its settlement position when we proceed with these private meetings. Also, if the clients were present it would be rude not to explain the technical vocabulary and legal concepts used, but doing so would extend considerably the time the process would take.

I point out that the purpose of the initial sessions with the lawyers is to get a sense of how each side views the case and of what the settlement possibilities might be. I then reassure the clients that their lawyers will keep them fully apprised of what transpires in the meetings with me and that it is the clients, not the lawyers or the judge, who hold the decision-making power in the settlement negotiations. Finally, I observe that we will hold a brief meeting as a group at the close of the conference so that I can report, at least in general terms, on the status of the negotiations. As a matter of courtesy, it is a good practice to ask if anyone has any questions about how the conference will proceed before launching the first round of one-on-one sessions. It is also a good idea to tell the parties that they can ask the judge questions during the transitions between private caucus sessions if, after consulting with their lawyer, they are concerned about some aspect of the procedure. Simply making the clients feel invited to share their concerns can reduce the alienation this process might otherwise engender.

It is also important for the judge to outline the basic ground rules about confidentiality in his opening remarks. He should point out that litigants cannot try to prove liability or damages at trial by introducing evidence of offers or statements made during settlement negotiations. He should also point out that the private caucus format virtually eliminates the possibility that a party might have access to and then later somehow attempt to use any statements made by its opponent during the settlement negotiations. The judge wants to make it very clear, especially to the clients, that he will not disclose any information that he learns in confidence from any lawyer or party unless that lawyer or party first gives explicit permission to share the information with others. These explicit reassurances show that the judge is self-aware in this sensitive area and thus is not likely to inadvertently violate confidences.

Opening remarks can be used to set a constructive tone for the conference. That tone has two principal dimensions: one is relaxed and informal, the other is upbeat and optimistic. The judge may encourage a relaxed atmosphere by not wearing judicial robes and by being friendly, informal, and open. The judge may go to meet the participants rather than having them come to meet him. He may ask them to remain seated when he enters the courtroom where they have gathered, then go into the gallery area to shake their hands and talk to them about the procedures he will use. Obviously the goal is to create as much distance as possible between the feeling at the settlement conference and the formalism, pugilism, and defensiveness normally associated with a trial.

It is neither effective nor appropriate for a judge to create an atmosphere that threatens or intimidates the participants. I explicitly reassure the participants in the conference, in my opening remarks, that

I think it is unfair and unprofessional to use my position to try to pressure lawyers or litigants into accepting either my views or any particular terms of settlement. I state clearly, at the outset, that I will have no power over the ultimate disposition of the case if it goes to trial and that I will make no effort during the conference to pressure anyone to accept any given proposal or line of reasoning. To reinforce this message, and to make clear my perception of my function in this process, I explain that my role is to help refine the analysis of the case, to offer reactions to evidence and lines of argument, to help form more reliable predictions about what might happen at trial, and to facilitate communication between the parties about possible grounds for settlement. I emphasize that I am here to offer the parties whatever help I can, not to try to force anything on them. The participants should be encouraged to view the judge as a resource and a tool, and to use him in any way that might be productive. To reinforce these messages, I emphasize that the ultimate purpose of the conference is to reason together toward a common prediction of what is most likely to happen at trial, then to use that reasoning and prediction to see if common ground can be found. The core of the process is reasoning, and cases that fail to settle represent failures of communication and reason.

Creating an upbeat, optimistic tone is somewhat more difficult. The challenge is to be positive about prospects without appearing to be naive. It does no good to gloss blithely over huge obstacles to reaching an agreement. On the other hand, it makes little sense to emphasize, in opening remarks, how far apart the parties appear to be and how insurmountable the barriers to progress seem. A judge deserves his role in this process if he fails to bring to it his own sense of energy and momentum. To have an energizing effect, a judge must appear to be solidly in touch with the realities of the situation and yet remain optimistic that the parties have a real shot at making the conference productive. The judge should encourage the participants to appreciate that a judicially hosted settlement conference presents a special opportunity. It brings everyone together on obviously neutral territory and compels them to analyze the case and their options systematically and in context, using the judge for feedback and perspective. Thus the conference is a uniquely propitious setting for searching for solutions.

To communicate an appropriate sense of realism and energy, and to encourage the participants to view the conference as a special opportunity, I might conclude my opening remarks by saying: "I have studied your submissions and have done some related homework. As you appreciate, you come here separated by some substantial differences of opinion about where this case might go. This is the kind of case, however, that ought to be settleable. I have helped parties settle others like it. There is a lot of pressure on my schedule, so I assure you that

I would not be here with you if I felt this was likely to be a waste of time. Despite your differences, I think we have a real shot at making progress today. I am prepared to commit a lot of energy to this goal. I hope each of you will reciprocate. I also hope that each of you will use me and the opportunity a conference like this presents to get feedback, to learn through exchanges of views, and to round out your perspective on the case. Let's get started. I will meet first in chambers with Mr. Jones, counsel for plaintiff."

Most settlement conferences I host can be divided into three overlapping stages. In the first, the parties present the essence of their views of the case to the judge (in private caucus sessions), with the judge editing very little, playing for the most part the role of a student. In the second stage, the emphasis is on analysis, with the judge playing a substantially more assertive role, probing evidence and legal theories, trying to educate himself and the parties about the strengths and weaknesses of their respective positions. The third stage consists of the negotiations themselves, with the judge helping parties exchange offers and demands and develop alternative components of possible agreements. The paragraphs that follow track this conceptual division.

B. Presentations by the Lawyers: The Initial Private Sessions with One Attorney at a Time

There are several important points for the judge to keep in mind as he launches the first round of private meetings with counsel. The first is that he should keep approximately equal the amount of time he spends with each side and he should not make the first session or round of sessions too long. There is a danger inherent in the structure of the conference that the judge will spend a disproportionate period with the first lawyer he takes into chambers. There is more to learn from the first lawyer simply because he is first. The long period behind closed doors with one side can undermine the other side's confidence in the judge's neutrality and can spawn fears that he is being sold a bill of goods by lawyer number one.⁶⁴ So, the judge should learn as much about the case as possible before the conference begins, then exercise discipline in the first round of caucuses so that he spends equal time with each lawyer, spreading his learning over several sessions if necessary. If the lawyers' written settlement conference statements are thorough these initial sessions need not be lengthy. However, I often find that the statements filed in advance of the conference are too superficial to support the quality of analysis needed to make the negotiations productive.

It is important for the judge to begin the private caucus sessions by

64. Author's personal experience.

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permitting each side to tell its story in a non-judgmental environment. There are two key points here. The first is to let each lawyer talk; the second is to suspend, temporarily, the instinct to aggressively ask questions and to force counsel to move efficiently through an analytical framework that the judge has predetermined. The judge should move into an analytically more penetrating mode only gradually, after the first round, and when making that transition he should do it through questions rather than through pronouncements of judgment. In the beginning, it is important that the judge not assume that he knows the case and the parties' postures so well that he can shape the discussion. Instead, he should open the first private session with each lawyer by asking her to describe, briefly, the essential aspects of the case from her client's perspective. The judge should permit counsel to meander a bit in these first contacts, because what he perceives initially as a digression may turn out to be of considerable consequence, either to the merits of the case or to a party's position on settlement.

Moreover, by letting the lawyers talk the judge gives them an opportunity to drift into disclosures or concessions that he never would have anticipated. In short, it is important in these first sessions not to act like a judge sitting on the bench in open court. The judge cannot succumb to the temptation, at the outset, to assert control over the analysis or over other aspects of the process. This entails resisting the temptation to engage in intellectual sparring, to show off analytical acumen or knowledge of the relevant subject area, or to make evaluative comments about or to criticize counsel's narratives or statements. In the beginning, the judge's job is to listen and to absorb, not to direct. There will be time enough to take charge intellectually, should doing so turn out to be appropriate.

By letting the lawyers do most of the talking at the outset, the judge also reinforces an important message: that he is open minded, that he wants to learn from them, that he has not come to the conference with predetermined ideas and preset objectives. This appearance of openness will enhance the credibility of the evaluative comments the judge offers later in conference. Moreover, the judge's initial assessments of the parties' stories or positions can turn out to be wrong.

I recently hosted a settlement conference in a case that a manufacturer filed as a simple collection action, seeking recovery of about \$15,000 for goods sold and delivered to a retailer. The defendant had filed a counterclaim, but in the initial sessions I viewed it as simply a move for leverage and did not take it seriously. My instinct was to urge the defendant to offer most of the money it apparently owed the manufacturer, as the amount involved was too small to support extensive discovery and a substantial trial. But the defendant balked, insisting that its counterclaim was real and that defects in the plaintiff's product had

led to failure of defendant's business. When the first round of discussions ended with the parties far apart, I assumed that it would just be a matter of time before the defendant came around. During the discovery that followed the first settlement conference, however, the defendant generated very substantial evidence in support of its counterclaim, evidence that made it appear that the counterclaim might be worth hundreds of thousands of dollars, thus completely overshadowing the value of the original collection action.

I learned all this because during the first conference I managed to suppress my judgmental instincts and to disguise my feelings about the case. Instead of expressing my real but misconceived feelings, and pressing the defendant to put some money on the table right away, I suggested that the parties conduct discovery to try to educate each other and me about the value of the counterclaim, and that thereafter we would hold a follow-up conference. Had I disclosed, in the first round of sessions, my true feelings about the case, I would have been lost as an effective facilitator of subsequent negotiations. I would have exposed a premature judgment, based not on the evidence in the case at hand, but on cynicism born out of observing defendants in other cases file essentially vapid counterclaims solely to gain some leverage in settlement negotiations. The moral of this story is clear: it is important to suspend both judgment itself and articulation of judgment until the parties have developed sufficient evidence for you to have an opinion that is in fact reliable.

At the close of each initial private session, it is very important that the judge make sure that she knows what information is to remain confidential. By taking the time to explicitly clarify this matter with each lawyer, the judge accomplishes two things: she reduces the odds that she will misunderstand what she is free to disclose and she increases counsel's confidence in her by showing that she is self-conscious about this important responsibility and is disciplined enough to be trusted. When advocates trust the judge to keep their secrets they are more likely to be open about their true positions, and the more open they are about their positions, the better able the judge will be to identify common ground or at least to assess prospects for making progress toward it. The judge should take care to clarify what she is free to disclose at the end of every private caucus session throughout the negotiations. Judges should avoid any tendency to get sloppier about this as the negotiations wear on into multiple rounds. This sloppiness is especially likely to surface when the judge feels some momentum building toward an agreement. When the judge senses such momentum, she may tend to move quickly from side to side, trying to capitalize

on the movement.⁶⁵ This is the environment which is most conducive to errors.

C. The Analysis Stage

After the initial round of private talks, which should be dominated by the judge's listening to counsel, the host should begin shifting the discussion into a more analytical mode. As this transition is made, the judge should explain again to counsel that his goal is to help them dissect the case systematically and objectively, with a view toward developing as tightly reasoned a basis for estimating its value as possible. The judge should also explain that he wants to focus on the liability aspects of the case before turning to damages and before trying to come up with overall valuations for settlement purposes. By focusing first on the liability questions, the judge accomplishes two things: he encourages an analytical tone and he avoids the areas of the case about which people are most likely to be sensitive and emotional. His goal is to promote a feeling that the process is dominated by reasoning and to generate reason-based momentum before reaching the most emotionally charged parts of the conference, which usually are those that involve money.

On the other hand, because it is not wise for the judge to begin the part of the conference in which he is most active by asking questions that probe the areas where a lawyer or a party is likely to be the most defensive, there may be cases where the wisest course during the analysis stage is to focus first on the damages question. If analysis of liability would force counsel or litigant to confront evidence or to discuss behavior that is especially damning or embarrassing, starting with the damages aspect of the case might be the only way to try to develop some positive momentum. It also might make sense to start with the damages issue when everyone seems to recognize that the settlement value of the case is relatively small. In that circumstance, discussing damages is not likely to be threatening and counsel may appreciate the efficiency of moving right to the center of things. Finally, it might make sense to work the damages side first when the defendant is almost judgment proof, so that regardless of the liability picture, there is very limited room for maneuvering on the numbers, or when the plaintiff's principal interest is in some special form of relief that might not be too painful for the defendant to accommodate.

In any environment, however, there is a danger that if the judge focuses first on the damages issues he will give the parties the impression

65. *Id.*

that he already has formed a judgment about liability or that he is more interested in disposing of the case than in understanding it. To create either impression is to court disaster. The judge wants the lawyer and litigants to feel, when he begins the analysis stage, that he has an open mind, that he intends to form opinions about what is likely to occur at trial only after carefully exploring the evidence and arguments on both sides, and that the only kind of settlement he is interested in promoting is one that the parties feel is fair. If he jumps too quickly toward the bottom line (by probing positions on numbers right at the outset), he does nothing to promote these kinds of feelings. So if the judge decides to start with the damages issues, he should explain why he is doing so, he is not making any assumptions about the liability side of the case, and that his goal is to try to help the parties reason toward a solution that everyone believes is fair.

There are many different tools that judges can use to move the conference into an analytical mode. The simplest and most straightforward tool consists of the judge asking questions of counsel. The second tool lies in asking the lawyers to change hats, and, in private, to present to the judge their opponent's best case. The third tool is for the judge to demonstrate to each lawyer, again in private, how she would argue the case if she represented the other side.

In most of my settlement conferences, especially in simpler cases, I shift to the analytical stage simply by asking questions of each lawyer in the second round of the private caucus sessions. Questions can be used to achieve several different analytical ends: to fill holes left by the lawyers' initial presentations, to probe the strength of evidence that supports the parties' versions of key facts, to refine significant lines of legal reasoning and to test the authority for them, and to explore how parties respond to evidence described or reasoning advanced by their opponents. I use such questions not only to move to a more sophisticated level of understanding of the case, but also to attempt to establish my own analytical credibility and to show counsel that I have a well-developed grasp of the relevant evidence and law. There are some significant advantages to using well-framed questions to establish your credibility rather than the narratives of the case with which Judge Mayer opens his conferences.⁶⁶ Beginning with a factual narrative risks making a significant error or creating the impression of having already formed judgments about contested issues. The judge runs neither of these risks by simply asking questions, unless the questions are obviously rhetorical or loaded with undefended assumptions. The judge can use questions very effectively to demonstrate his command of the case by incorporating into them evidentiary or factual details to which counsel

66. *Supra* note 52.

have alluded in their preconference submissions.

He can also use your questions as tools to teach the lawyers about their own cases. For example, the judge can ask a lawyer in a private session to explain how the evidence he has generated satisfies each of the elements he must prove to prevail on a particular theory or affirmative defense. Such a question forces counsel to identify each of the requisite elements, then to review his evidence to see if it fulfills his proof needs. Or the question could hone in on a particular element of a legal theory that the judge is unsure the evidence will satisfy, or on which he feels counsel has not adequately focused. The question could be framed as a hypothetical. Hypothetical questions are an excellent tool for exploring parties' positions during the negotiation stage of the conference, but they also can be used to good effect in the analytical stage.

Judges should understand that questions can have counterproductive effects or at least can create adverse reactions. In the analytical environment, there is a subtle psychological art to question-asking. Especially in the early parts of the analytical stage, the judge should take care not to put counsel on the defensive needlessly. Toward this end, it is a good idea not to go for the analytical jugular with the first set of questions. Instead, the judge should open with questions to which counsel can respond relatively comfortably. The judge might begin with questions whose answers are likely to be positive for the responding attorney's client, or that probe areas in which counsel and his client are not likely to be especially sensitive or to feel vulnerable. In some cases, this may mean that the first few questions will be in areas of only marginal significance. The judge endangers his analytical credibility if his questions remain at the periphery for too long, but there is a net gain if the judge begins the questioning in ways that do not force counsel into a self-protective mode right at the outset. The judge is more likely to get movement later on if he permits people to have some positive feelings in the beginning and to feel some sense of competence. On the other hand, if the goal is to encourage both sides to appreciate the risks that going to trial would create, obviously it is not effective to pose questions that encourage counsel to focus at great length on the strong points in their case.

Another reason for not going for the analytical jugular immediately is that doing so risks creating the impression that the judge made up his mind about the case before the conference started and that his questions are merely a ritualistic camouflage for a hostile mind. One of the judge's principal objectives in the analytical stage is to persuade all parties that her movement toward an assessment of the case is careful and logical. This impression can be compromised by questions that cut too deeply at the outset of the negotiations.⁶⁷

67. Simultaneously, however, the host of the conference must beware of the danger

Judges should try to reduce the accusatory onus that seems implicit in questions whose answers are significant and unfavorable to the responding party. It is healthier if the judge does not appear to be the source of questions that might be perceived as hostile. One format that can help achieve these ends is to pose the question(s) as a request to help the judge prepare to deal with the lawyer on the other side. For example, when the judge thinks there are strong rejoinders to a line of reasoning that is being advanced by the lawyer with whom he is caucusing he might say: "How should I expect your opponent to respond to that line of reasoning [or to that evidence]? When I press this point with him, what will he say? Help me anticipate."

Another format that deflects attention away from the judicial host consists of ascribing a sensitive question or a powerful rejoinder argument to opposing counsel. This tactic is only possible if opposing counsel has in fact made the point and does not view it as confidential. If the situation permits, the judge might say: "When we got to this point in my last session with Ms. Jones [opposing counsel], she asked me how you would rebut [a particular argument or testimony or other piece of evidence]. When she asked me that question I found that I couldn't come up with much of an answer. Could you help me here? What is the response from your client's side?" This phraseology suggests another device for reducing tensions that tough questions can generate: phrase questions so that the judge is asking not for the position of the responding lawyer, but for his client's position. There are circumstances in which it will help move things along if the judge gives a lawyer with whom he is meeting privately an opportunity to make it appear that it really is his client who is to blame for taking an unreasonable position or who has no good response to a strong point made by the other side. Phrasing questions in this way has two positive effects: it permits an attorney to use his client as an excuse (and thus to avoid personal embarrassment) and it reinforces the emotional separation of counsel and client that is essential to good lawyering and healthy negotiations.

The second tool that can be used by a judge to advance the analytical ball is to ask each attorney, during the private sessions, to switch adversarial hats and present the "best case" for the opposition. To make this exercise worthwhile, it is important for the judge to urge each

of misleading counsel into thinking that she is impressed by a line of argument or evidence that she in fact believes is weak or patently implausible. There is a risk that a judge will create such a misleading impression if she does not respond at all, or she nods in apparent approval, at the close of a presentation by counsel that she in fact regards as thoroughly unpersuasive. At such a point the judge should ask a general question whose purpose is to alert counsel to the fact that she is skeptical. The judge may say, for example, "Do you think that line of argument will sell? Let's take up some other questions I have first, then come back to take another look at this position."

lawyer to be as specific as possible, i.e., to ask each lawyer to articulate the legal theory that seems strongest for the other side and then to specify the evidence that offers the most support for that theory. The judge wants each lawyer to see the case, to the extent possible, through the eyes of her opponent and thus both to appreciate the other side's point of view and to see more clearly some of the points where her own case might be less than impregnable.

If counsel resist the judge's suggestions that they present the other side's best case, or if their presentations are too self-serving to serve the intended purpose, he might turn to the third tool. The judge may suggest that for the purpose of refining everyone's comprehension of the competing views, he will play devil's advocate and present, privately to one side at a time, the opposing party's best case. Undertaking to "lawyer the case" against one side at a time can be both very effective and very risky. A judge who decides to use this technique must explain what he is doing and why, and must be sure that each lawyer (or each lawyer-client team) clearly understands that he is going to do the same thing to each side in successive private sessions.

I destroyed my effectiveness, by destroying the appearance of my impartiality, in a conference in which I failed to make this clear. In a private session with the lawyers for one side, I said, without warning, that I would like to "lawyer" the case against their client. Then I proceeded to demonstrate how I would present the matter at trial, emphasizing the arguments and evidence most damaging to the party whose lawyers I was addressing. I do not know how telling my advocacy was; I know only that the lawyers who watched me concluded that I had essentially been converted by their opponents and that I had lost all semblance of neutrality. These lawyers also expressed great fear that the effect of my contribution to the settlement conference had been to intensify their opponent's commitment to a position that they considered patently unreasonable. Needless to say, I did not help to settle the case. My error consisted of failing to explain, before I launched my presentation, that I was going to play the same kind of devil's advocate role for both sides. I also failed to make it clear that I had not shared with their opponent, and would not share with him, my views about how to argue the case most effectively from his side. It is very important that counsel not infer that you are coaching the other side in how best to present its case. In the case I just described, I had permitted the lawyers for one side to infer not only that I had reached a one-sided conclusion about how the case ought to come out, but also that I was helping the other side prepare its trial arguments. Permitting counsel to draw these inferences had disastrous consequences.

What should the judicial host do when he simply does not understand some aspect of the case or the relevant law? Rather than risk all

credibility by pretending to understand and then making a statement or asking a question that reveals his ignorance or confusion, he should ask the lawyers to teach him. No judge can be expected to have mastered every area of law; nor are judges expected to understand the evidentiary background of given cases as thoroughly as counsel should. Attorneys are likely to have greater confidence in the judge's ultimate assessment of the case if they know that he has worked conscientiously to build a reliable base for his opinion. Moreover, judges should keep in mind that it is the lawyers' job to teach them their cases. If the judge does not understand, the lawyers have failed as teachers. Thus a judge should feel no compunction about interrupting when counsel says something he does not understand and asking him to explain.

Near the end of the analysis stage, after the judge has worked carefully through the relevant evidence and law with counsel, he should decide whether or not it would be wise, before launching the negotiation stage of the conference, to make explicit his assessment of the persuasive power of specific evidence, or legal arguments, or the relative overall strength of the parties' positions. As the results of the A.B.A. survey make clear, lawyers feel that it is very important that judges who host settlement conferences express opinions and offer analyses of the case.⁶⁸ The survey results, however, do not help judges identify the juncture at which they should share their views, or how they should communicate them. It is inevitable that at least some of the questions the judge asks will serve as clues to his or her views, and in many cases it might be wisest for the judge not to be more explicit about his feelings about the parties' positions until he has given them a chance to try to negotiate a solution. There is a risk that by being too explicit about views too early a judge will compromise his ability to serve as a facilitator or to help move the parties onto common ground.

A dimension of this risk is that if one party concludes that the judge has formed a judgment hostile to him on the merits, he may be so disappointed that he will refuse to share additional information during the negotiation stage, perhaps even refuse to disclose privately any useful information about how he might be willing to bargain toward a solution. Similarly, a party who feels that the judge's view of the merits favors its opponent may fear that the judge will conspire with the other side in the negotiations and manipulate the process in order to secure a favorable outcome for the opposition. If the judge loses one party's trust, his ability to get him to be honest and flexible as he makes or responds to offers or demands may be seriously impaired.

Another reason for the judge to think twice before sharing his views of the merits of the case with counsel before the negotiation stage gets

68. W. BRAZIL, *SETTLING CIVIL SUITS* 2 (1985).

seriously underway is that he may well need to use his views as ammunition in the skirmishes that will follow as part of the negotiation process. When the negotiations get serious, the judge is likely to need some intellectual leverage to get the parties to common ground. The most obvious source of such leverage is his analysis of the strengths and weaknesses of various aspects of the parties' positions. If the judge exposes his analysis too fully too early, he may have nothing left to use as leverage at the crucial points in the negotiation stage. Thus it is not wise for the judge to volunteer his entire analysis before the dealing gets serious; instead, he should keep in reserve a few substantial points or comments for use during that last push toward closure.

If the judge decides to share some of his views before moving fully into the negotiation stage, either because the lawyers press him for them or because some comments on the merits seem necessary to lay the proper foundation for the negotiations, the judge might express his opinions with obvious qualifiers or in some tentative or hypothetical form, and focus his comments on discrete subparts of the case. It is not a good idea to make a prediction, at this stage, about who is likely to win on the merits and what the size of the judgment might be (if you think the plaintiff will prevail). It is wiser for the judge to save opinions on these larger questions for the latter part of the negotiation stage.

D. *The Negotiation Stage*

The deeper and more thorough the parties and the judge have been during the analysis stage, the easier the negotiation stage is likely to be. There are negotiations, of course, in which reason plays a secondary role, acting as a cosmetic cover for a game in which counsel or parties rely primarily on manipulation of economic or psychological power. There also are situations in which emotions dictate positions that reason would never endorse, and cases in which the room for reasoning and for creativity is severely restricted simply because the defendant has little money. In most cases of any substance, however, the dominant force in the settlement dynamic is reasoning about self-interest. And when reasoning is the dominant force, the quality of the analysis stage will determine the productivity of the negotiation stage. Judges should not be in a hurry to get to the negotiations *per se*; they should resist the temptation to steam ahead to the numbers.

While it is true that the judicial host of a settlement conference contributes most by helping the parties test and refine their analyses of the evidence and law, it also is true that judges can contribute a great deal by helping the litigants search creatively for packages of terms that might be acceptable to both sides. One valuable contribution a judge can make is to bring a fresh perspective to the way the parties

define their objectives and fresh ideas to the search for solutions. Thus, near the beginning of the negotiation stage, judges should make broad inquiries designed to flush out the parties' true objectives, to get a sense of how the parties prioritize various items on their wish lists, and to determine whether it is feasible to recast some of the parties' goals in ways that make satisfaction of both sides more likely.

In searching for possible elements of settlement packages, the judge should look beyond the litigation itself to the parties' situations in the "outside world." Looking at each party's extra-litigation situation holistically, the judge should first attempt to determine what the litigants' need and want most. Then, most importantly, the judge should go on to ask: "what could the defendant do for the plaintiff that the plaintiff could not do for itself, or that the plaintiff could not do as efficiently or as effectively for itself?" Of course, the judge should ask the same question from the opposite perspective as well: "what is the plaintiff in a better position to do for the defendant than the defendant could do for itself?" Answers to these kinds of questions can help the judge develop possible bases for settlement that have little to do with the substance of the underlying action but still achieve important ends for the parties. A party who helps develop this kind of solution to a litigation problem can feel that he has done something creative and that he is using his resources in a constructive way. Since litigation is so often dominated by negative feelings, and so often seems like an essentially destructive and wasteful exercise, proposals for settlement that make people feel creative and constructive have a special appeal.

At the beginning of the negotiation stage the judge also should attempt to ascertain what each litigant could give up with the least pain. Sometimes this will be cash; sometimes it will be an annuity; sometimes it will be an apology. Sometimes it will be a commitment to buy products in the future, to supply services at below-market rates, or to refrain from engaging in certain acts or business activities. For example, a business that is having cash-flow problems might find it much less painful to make commitments about future business than to come up with a big cash settlement, even when the full cost of the future business (on terms favorable to another litigant) is considerably greater than the value of the cash. If the judge can identify the kinds of things a litigant can give up with the least pain, he should start the negotiations by first seeking concessions in these areas. The judge's goal is to use concessions or agreements in the least painful areas early in the negotiations to build a sense of momentum and to encourage each side to view the other as proceeding in good faith. The more momentum and trust the judge can build before tackling the most difficult or painful aspects of the negotiations the better the chances of reaching a settlement.

In a great many cases there is really only one subject of the settlement negotiations: money. In cases that are only about money, and money up front, the judicial host of a settlement conference must make a couple of sensitive judgments: which juncture would be appropriate for counsel to put their opening numbers on the table and what is the most constructive way to have these numbers articulated? Although identifying the appropriate time to begin the bidding is not easy, I have two suggestions. The first suggestion is that you discourage counsel from putting "serious" numbers on the table until you are satisfied that the lawyers have done real justice to the analytical stage of the process. Prior to the conference in many cases the parties will have exchanged offers and demands which they know are outside the true settlement range of the case. Sometimes they will include somewhat more realistic figures in their written settlement conference statements. In most cases, however, counsel understand that the "real bidding" does not begin until the conference is underway. Judges should not permit this bidding to begin until well into the conference, after pressing counsel to think carefully and systematically about the strengths and weaknesses of each party's case.

Second, if a judge senses that the parties are miles apart in assessments of the case, but that there is more discovery or investigative work to be done and that a follow-up conference is a real possibility, the judge should discourage the lawyers from putting "serious" numbers on the table at the first conference. Prospects for ultimate success can be damaged if the parties begin what are supposed to be serious negotiations by articulating figures that are mutually insulting. Moreover, the figures the parties put on the table in this first session are likely to become benchmarks against which counsel forever after will measure their achievement as negotiators. If a lawyer (or party) measures his success by how little he moves from his initial position, and this initial position is miles away from the figure it will take to settle the case, the negotiations are in trouble. Rather than invite this kind of trouble, judges should tell parties whom they know will be poles apart that the waters should not be polluted by premature numbers and postpone discussion of specific figures until the second conference, to be held after additional discovery or other homework has been completed and after everyone has had a chance to digest what they learned at the first conference.

On the other hand, if the date set for trial of the matter is very close and the evidentiary background of the case has been so thoroughly developed that a judge senses that a follow-up session is not likely, the parties should not be permitted to leave the negotiations before the judge is satisfied that their numbers are in fact so far apart that there

is no chance of reaching an agreement.⁶⁹ Lawyers can be very misleading about where their clients really stand and sometimes leap the gap between analysis and settlement figures in mysterious ways. Since judges in many cases cannot divine the parties' real positions, they must be sure not to lose last opportunities to settle by failing to push for numbers when the process is winding to a halt. In these settings, I like to use hypothetical questions to probe for the range each party would be willing to take seriously. At the end of negotiations, I might say, for example: "I have no reason to believe the plaintiff would take a figure in this range, but would your client consider making an offer somewhere in the vicinity of \$100,000 if that would seal the deal?"

Whether it is in this last ditch context, or, much more typically, earlier in the negotiation process, the judge will have to make a difficult decision about how he wants numbers first articulated. Should the judge ask counsel to specify their offers and demands before she exposes her assessment of the value of the case, or should the judge go forward first, indicating the dollar range within which she thinks a reasonable settlement would fall? When I first started hosting settlement conferences I was shocked at how far apart and how unrealistic the lawyers' opening offers and demands were. Sensible and proximate positions were arrived at through ritualistic exchanges. I responded by developing a system in which I would articulate a valuation range before permitting counsel to put their client's numbers on the table. The breadth of a properly articulated range varies according to the interplay of many factors, including the size of the case, the level of confidence that the judge has in his analysis, and how well-developed the evidence was by the time of the conference. The purpose of this approach is to impose some realism and restraint on the lawyers' bidding and to encourage everyone to enter the same valuation range before launching the serious negotiations.

I am not sure whether my system worked. I gradually abandoned it as I discovered inherent risks that weigh against its employment. One such risk is that the judge's valuation range will alter the expectations with which parties entered the conference in a direction that makes it more difficult to reach an agreement. The following story illustrates this point. Prior to the conference, the plaintiff had decided that he would settle for a figure between \$60,000 and \$80,000. The defendant came to the conference prepared to offer between \$50,000 and \$65,000. The judge who hosted the negotiations did not know these figures. After conducting his analysis of the case, and without asking for offers or

69. Many times I have inferred, from the parties' comments during the analysis stage, that the odds of finding common ground were essentially zero, only to discover, as I pushed in the waning minutes for hard figures, that the positions the parties were prepared to live with were in fact quite close.

demands, he announced his valuation range: \$80,000-\$100,000. This announcement caused the plaintiff to become more rigid and demanding in subsequent negotiations: he refused to consider the figures at the lower end of the range he had developed prior to the conference. However, the judge's views failed to move the defendant into the higher range that had become necessary to satisfy the plaintiff. As a result, a case that in all likelihood would have settled without any expression of judicial opinion did not settle because the judge's views made one party more demanding than he had been before hearing these views. This result might have been avoided if the range the judge had articulated had been appreciably broader, but ranges that are too broad will not be useful. It is arguable, of course, that the judge's valuation range prevented a miscarriage of justice and this is more important than securing a settlement. The persuasiveness of this argument depends on the accuracy of the judge's valuation. Unfortunately, it is very difficult to know the true settlement value of a case until after a jury returns a verdict.

A judge who articulates her valuation range before pressing counsel to make realistic offers or demands also risks losing credibility with one or both sides if her range is too far from the boundaries identified by the lawyers. If both lawyers are convinced that the case is worth less than \$100,000, but the judge suggests a settlement range of \$150,000 - \$200,000, counsel may not take very seriously her views about other matters.

Even when my valuation range was not perceived by the lawyers as naive, I felt that articulating it too soon sometimes made it appear that I had lined up with one side. Unless my range was very broad, it almost invariably was more favorable to one side, and being perceived as having lined up with one side, even after proceeding thoughtfully through the analysis stage, seemed to compromise my ability to facilitate the process thereafter. The side against whom I appeared to have moved would become less trusting, less open, and more rigid. Endorsing a given valuation range necessarily implies at least partial acceptance of some arguments and/or evidence and at least partial rejection of others. When a judge implicitly tips her hand in favor of one side, the other side may respond with resentment. Moreover, unless it is a type of case with which the judge has had a great deal of experience, and the evidence and law have been very well developed, there is a real risk that when the judge moves toward an overall valuation he or she will simply be projecting biases or making unreliable guesses.

Not long ago I made this kind of mistake in a large business case. After hearing presentations for about an hour on each side and probing both sides with questions, I obliquely suggested to both sides, in private sessions, an overall valuation that was much more consistent with the

plaintiff's wishes than with the defendant's. I promptly endeared myself to the plaintiff, but alienated the defendant and essentially destroyed my usefulness as a negotiation facilitator. Sometime later I had occasion to revisit some of the substance of the case in another setting. Gradually I realized that my initial valuation of the case had been quite naive. I had been guilty of myopically generalizing from my personal standards to the business community. In other words, I had applied to the corporate defendant the rather puritanical and demanding standards that I apply to myself as a judge. I had ignored the standards of the marketplace, and thus failed to apply the criteria that were most likely relevant to the commercial case before me. By being too personally moralistic, I lost touch with the norms that would in all likelihood have been used to assess the behavior of the parties. This error in judgment made my valuation unreliable and caused the defendant, who apparently understood what I was doing, to lose confidence in my feedback and suggestions. This is the kind of error, of course, that one could make at any stage of a negotiation, but I would have been less likely to make it if I had let the negotiations move at their own pace, instead of rushing in to impose my feelings and figures.

These observations are not intended to suggest that the judicial host should never express her overall assessment of the case. As the A.B.A. survey shows, lawyers want judges to express their views.⁷⁰ The question is not whether the judge should suggest a valuation range, but when, or under what conditions.⁷¹ The judge's wiser course is to play his ultimate valuation cards closer to his chest until late in the negotiation stage, after he has a well-developed sense of what the lawyers think the case is worth and after he has attempted to steer them toward a settlement solely on the bases of their views. By holding back his own valuation, the judge preserves his options, maintains the confidence of both sides, and keeps in reserve his most powerful intellectual ammunition.

For judges who have less time or patience for this business, or who for any other reason decide to articulate their own valuation before soliciting the "serious" offers and demands from the lawyers, a cautious course is advisable. The judge should expose his valuation in an obviously tentative mode, surrounded by qualifiers, and in a range of figures that leaves a good deal of room to maneuver.

If a judge decides to press for more "serious" offers or demands before making explicit his own views on valuation, the judge should make a speech to the lawyers, privately, one at a time, in which the judge vigorously encourages them to start with a figure that is neither (1) clearly extreme nor (2) their client's real bottom line. I have found

70. W. BRAZIL, *supra* note 68, at 77.

71. *Id.*

that lawyers react quite positively when I explain openly my theories about how to conduct negotiations in ways that maximize their productivity. Thus, I tell counsel why I think it is a bad idea to start with a number that is too extreme or that is in fact their bottom line. I point out that a figure that is obviously extreme damages the credibility of the person who purports to put it on the table. When a lawyer makes an offer or demand that no reasonable person would take seriously, he needlessly increases the risk that the other side will not believe him later when he puts his client's real figure on the table. When a lawyer who has a history of making big bluffs gets to his client's real bottom line, he will have a very hard time getting anyone to take him seriously.

A settlement judge should point out to counsel that a lawyer who puts absurd numbers on the table needlessly jeopardizes his credibility in other areas. A lawyer will be more effective in settlement negotiations if the judge and the other lawyers are inclined to believe what she says about evidence that has not yet been the subject of discovery or legal authority that has not been searchingly probed. For example, a lawyer who has interviewed a witness who has not yet been deposed will be more effective in settlement negotiations if the judge and the other lawyers believe what she says about what the witness will say and about how credible he will be. Similarly, a lawyer will be more effective if the other participants in the negotiations believe her when she says she can produce documents with specified contents, or that her client will agree to refrain from certain acts if a settlement can be reached. A judge to whom an incredible offer or demand is made in a private session should explain the credibility risks to counsel rather than simply passing the offer along to the other side.

The judge also should point to other negative effects of making clearly unrealistic offers or demands. She should tell counsel that she has seen many settlement conferences come to an abrupt halt because one side's figure was so extreme that it provoked nothing but ill will and resentment in the opposition. She should emphasize that putting a patently unrealistic figure on the table gives the other side no incentive to negotiate in good faith or to respond at all. At best, making an unrealistic offer inspires an equally unrealistic response. At worst, it terminates negotiations.

Having emphasized these points, the judge should go on to explain why, in her experience, it also is not a good idea for a party to open settlement negotiations with its real bottom line figure. Of course, parties rarely are tempted to open with their bottom lines, but explaining why doing so is not a good idea gives the judge an opportunity to make counsel a little more self conscious about the affect that various moves they might make could have on the negotiation process itself. In this spirit, the judge should explain that the lawyer who announces that his opening figure is in fact his client's real bottom line will be perceived

as making some form of power play. A move that is perceived as a crude power play can stop the negotiation process in its tracks. Moreover, a lawyer who opens the negotiation stage by presenting a figure that is carved in stone seems arrogant. She in effect seems to be saying: "I have learned all there is to learn about this case; my analysis is infallible; I have foreseen all the conceivable scenarios; and there is nothing that could happen or that I might hear that would cause me to recommend that my client make some adjustment in the figure he has put on the table." A lawyer who really feels this way is a fool. A lawyer who projects this image makes few friends and encourages none of the good will that can contribute so much to the negotiations.

By opening with the bottom line figure a lawyer also needlessly paints himself into a "face corner"; he makes it virtually impossible to change positions without losing face. To announce at the outset that his figure is as low or high as his client will go gives counsel no room to maneuver. The judge should point out that he has never seen a negotiation in which some room to maneuver was not essential.

Building from this point, the judge should go on to describe the following important aspects of the psychology of negotiations. The likelihood of any given negotiation being successful improves appreciably if the process permits each side, and each major actor, to emerge with a sense of accomplishment. The lawyers, in particular, need to feel that the work they have done at the conference on behalf of their clients has made a difference, and that because of their efforts, their clients' position at the end of the negotiations is better than it was projected to be at the beginning. This feeling of achievement is an important part of a lawyer's sense of professional competence. One of the most negative effects of opening a negotiation with a bottom line figure is that it deprives the other side of any opportunity to feel that it has achieved something during the negotiations. And since in virtually every negotiation each side is asking the other to make some kind of compromise, it is especially important that each lawyer's opening offer or demand leave enough room for the other side to feel, at the end, that it has received or achieved something in return for what it is giving up.

The judge should add that there is a much better chance of the parties reaching an agreement if, at the close of the process, they feel that each side has moved a roughly equal distance or has made concessions of roughly equal magnitude. The more the process seems to reflect this basic sense of balance, the more the parties are likely to feel that the result is fair. A lawyer who starts the negotiations by announcing his client's bottom line eliminates the possibility of generating this sense of parity of movement and equality of compromise that is so important to many people in this setting. By making these points explicitly near the beginning of the negotiation stage, the judge improves the likelihood

that the lawyers will not thoughtlessly take positions detrimental to the psychological environment and thereby reduce the odds of success.

The judge's most constructive course is to encourage both sides to open the negotiations with figures that are in the ball park but not right on home plate. The amount of room counsel should leave between their opening figure and their bottom line varies from case to case and may depend both on how confident they are in their analysis of the case and on their judgment about how much movement from the initial figures the other side is likely to need. If the other side is likely to feel the need for a great deal of movement or for major concessions, or if counsel knows that the other side is likely to open with an extreme figure, it would be appropriate to leave more space between the opening offer or demand and the real bottom line. The important point is to get opening numbers that are sufficiently realistic to show good faith and to offer the other side an incentive to respond in kind, but simultaneously leave room for the crucial balancing.

How does a settlement judge get the lawyers and their clients to play by these rules? The best way is to explain the governing concerns and then to openly ask counsel to follow the rules. Whether the lawyers will abide by the request is uncertain. Nonetheless, a judge who makes the effort will reduce the odds that counsel will needlessly hurt prospects for success by taking counterproductive positions. The same judge, however, must be careful not to accept too literally the positions proffered by counsel. The moral is: be slow to conclude that any given position a party has taken will not change or that significant movement is impossible.

What should the judge do, as the host of the conference, if, despite all his speeches, the opening figure a lawyer offers, in private caucus with the judge, is patently outrageous? He should bite his tongue. I destroyed my usefulness in a settlement conference I was hosting not long ago when I got visibly angry after a lawyer proposed a figure for settlement that I considered ridiculous. A much more constructive response would have been to say, simply, "I don't understand the reasoning that would lead to that number. Would you please walk me through the steps that got you there. That will help me present and explain your client's position to the opposition." If counsel cannot explain adequately the basis for his position, the judge might persuade him to change it by pointing out that the judge will not have any leverage with the other side, when he meets privately with it, unless he can present a rationally defensible position.

If counsel persists in making an offer or demand whose justification remains implausible or unpersuasive, a judge might respond by professing confusion. The judge might then inquire if some parts of the case have not been discussed yet. This kind of question can serve several purposes.

It gives a lawyer who has client control problems an opportunity to tell the judge about them. It also might help flush out a hidden agenda, although it is not likely that counsel will unburden their souls to the judge about objectives that have nothing to do with the merits of the litigation. The principal purpose of the question is to communicate to counsel the conviction that his valuation is appreciably out of line, and that unless he can come up with a reasonable justification for it the judge cannot in good conscience try to persuade the other side to take it seriously. This question puts the ball back in counsel's court and implicitly urges him to reconsider his position, perhaps adjusting it in the next round of negotiations.

Many lawyers resist initiating the negotiations, protesting that it is not fair to make their client bid against himself. If one side has put a number on the table that is clearly more realistic than the other's, it would be reasonable for the lawyer for the more realistic side to resist making unreciprocated movement and the judge should press the lawyer with the less reasonable figure to move first. As long as the judge can articulate a clear basis for the conclusion that the one figure is appreciably more realistic than the other, the judge may tell the side being asked for movement that it is because the figure their opponent has on the table is closer to the judge's valuation of the case.

The judge's job is more difficult when the figure of neither side is more realistic and each side resists movement because it does not want to bid against itself. The judge may pursue several courses of action geared toward initiating negotiations. One is to challenge directly the assumptions that seem to underlie the resistance to bidding against oneself. To be successful, the judge must explicitly challenge each assumption and feeling underlying the resistance.

One source of resistance to being the first to make a new move toward more realistic ground builds from concerns about fairness. Lawyers assert that it simply is unfair to make their client bid against himself. That position might make sense if the other side were not bidding at all, or were bidding much less realistically. But if the other side is bidding, and its bid is not clearly less realistic than the bid made by the side to whom you are talking, the fairness argument is unconvincing. A judge might ask the resisting lawyer: "Why would it be any more fair to force the other side to move first, to bid against itself?" Since, in this situation, there is no basis for distinguishing the positions of the parties, there is no basis, in reason or fairness, on which the court could decide which of the two sides to ask to make the next change in its position. A judge might explain that any choice between the parties would be arbitrary, then use this explanation to support the suggestion that the judge (as the neutral) simply flip a coin to see who makes the next move.

Another possibility would be to attempt to reconstruct the history of offers and demands to determine which party made the most recent change, then suggest to his opponent that it is his turn. If neither side has put a figure on the table, the judge can explain that it is customary for the plaintiff to begin negotiations by making a demand. If both sides have put several figures on the table and it is not clear whose is most recent, the judge might ask both parties to submit secret figures to him simultaneously in writing. The judge could indicate that he would not disclose the figures without the parties' permission, and that he would not ask for that permission unless, after reviewing the figures privately, he felt that there was some meaningful chance that the parties might ultimately find common ground.⁷²

A judge who questions the latter option might prefer to try to persuade one side to take the high road. The judge might say to the lawyer: "Both sides have put arguably comparable figures on the table. I have no basis for choosing one side or the other to be the next to move. Yet we all know there will be more movement, and that we can't make any progress until there is. I would be most grateful if you would take the bull by the horns here and help me get things moving by putting a new number on the table. This will signal your client's good faith and demonstrate that you are more interested in seriously exploring the possibilities of reaching an agreement than in keeping score or counting turns. By giving me a new number you give me leverage with the other side; you remove its excuses and enable me to press it to respond in the same good faith that your client will have demonstrated."

The difficulty with this kind of appeal is that it does not address the other concerns that inspire resistance to bidding against oneself. One such concern is fear of appearing weaker than the other side and more anxious to settle. When a judge senses that this fear is present and active, he might say something to the effect: "I simply don't understand why some lawyers feel that it is a sign of weakness to be the first to move toward a range of numbers that we all know is more realistic. Rather than being a sign of weakness to be the first to move, it seems to me to be a sign of strength. Rather than evincing some lack of confidence, it seems to me to demonstrate that you are so confident in your ability to value the case, and your ability to control yourself in the negotiation process, that you are not concerned about such pettiness as who appears to be the first to make a constructive move. I have always felt that it is the weaker lawyers who hide behind these ritualistic concerns. You know the range of numbers beyond which

72. This is a tool for breaking logjams that Chief Circuit Judge Gerald Weatherington of Miami, Florida, has used successfully.

you will go to trial; let's put some pressure on the other side by making a move in the direction of that range. You don't have to actually get into that range with this move, but let's head in that direction."

A third source of resistance to bidding against oneself may be a hope that runs through a lawyer's mind along the following lines: "If I hide my real valuation of the case, and the range of figures within which my client really would settle, and force the other side to show its more serious cards first, maybe I will be able to dupe the other side into accepting a deal that is much better for my client than he would in fact be willing to accept. If I force the other side to go first, maybe I will get a better deal even than I think I can get." To counter this source of resistance to being the first to move toward more realistic ground, the judge should make a statement like the following (assuming he really feels this way): "My discussions of the case with the other side persuade me that its assessment is relatively solid and that it is not going to propose or accept a figure that is naive. It knows that there will be no settlement at either extreme, and that there is going to have to be appreciable movement on both sides if we are going to reach an agreement. If I were to press it now for another figure, it would not come back with something unpredictably generous to your client. Instead, the figure would be a cautious move toward territory somewhere between the two positions now on the table. So, by getting the ball rolling you will not be giving up an opportunity for some windfall; there will be no windfall in this case. So please give me a new number so we can get this process in gear."

If none of these relatively direct approaches works, a judge might try the use of hypotheticals to break the ice.⁷³ When trying to get a lawyer in a private caucus to be the first to make a semi-serious settlement proposal, a judge might consider using the following approach: "To get things moving constructively here, I would like to pose hypotheticals to both sides. By proceeding through hypotheticals, we can get a sense of the direction in which each side might be willing to head but without committing anyone to anything. We can explore the possibilities without asking that actual new figures be put on the table. But, I don't want the assumptions that underlie the hypotheticals I use with either side to be completely divorced from reality, and thus fundamentally misleading. So, for this to work, I need you to indicate whether the range in the hypothetical I propose might, at least under some circumstances, be somewhere near the range that your client might

73. Judge Eugene F. Lynch of the United States District Court for the Northern District of California (formerly on the superior court bench in San Francisco) introduced the author to the use of hypotheticals in settlement negotiations and has developed great skill in employing this tool.

consider. I don't want you to indicate whether your client would make an offer in that range; all I want is some indication that the range is not so far off that it would be counterproductive to mention it to the other side in a hypothetical context. So, what I'd like to do is go to the other side and say: 'These figures are not on the table, but I need to use some tool to get a sense of where all of us might be, so I'd like to know how your client might respond if the defendant were to put together a package with the following kinds of components and with cash up front in the range of X to Y.' If you will permit me to pose this kind of hypothetical to the other side, I think we could make some progress here. What do you say?" If a judge does use hypotheticals like this, it is imperative that he make it clear to the side at whom they are directed that its opponent has not made commitments to the numbers or ranges used in the hypothetical question.

There are other ways that settlement conference hosts can use hypotheticals effectively. For example, if a judge feels that there is an element of one side's evidence or argument that is weak or vulnerable to an adverse legal ruling, the judge might communicate this feeling indirectly and probe for possible movement by asking the following kind of hypothetical: "If, after hearing all the arguments, the trial judge were to rule against you on X key evidentiary issue, might your client think the case would be worth a figure somewhere in the _____ to _____ range?" Another example of this kind of question focuses on the persuasiveness of specified key evidence. A judge might ask: "If you could foresee that the jury would find that X were true, what is the range of figures in which your client might place its settlement valuation of this case?"

If the approaches described above fail to persuade the parties to move, or if, after they have moved, they remain separated by a substantial gap, a settlement judge can resort to a riskier device that I have used with some success. At some point, after considerable analysis and negotiation, the judge, as host of the conference, probably will form a judgment about what the dollar range (or package of other elements) is that the parties will have to enter if there is to be a settlement. This is not a judgment about what the settlement figure ought to be; it is not the judge's independent assessment of the value of the case. It is his best objective guess about the kind of number it will take to settle the case, based on his judgment about how low the plaintiff might be willing to go or how high the defense might rise up. Once a judge has formed a judgment of this kind he may be able to use it to persuade one or both parties to move toward it. A judge might address the party who appears farthest away from the requisite numbers along the following lines: "I have listened to and probed both sides for quite some time now. Having done this in hundreds of other settlement conferences, I

have a sense of the dollar range that it will take to settle this case. The figures I am going to outline here do not necessarily reflect my personal values or my personal assessment of what is likely to happen at trial. I am acting, instead, as an objective observer, trying to share with both sides what I perceive as a fact of life in this negotiation. I am sharing this observation with both sides to see if there is any chance of making it. If there is a chance of this case settling, the figure apparently will have to fall somewhere between X and Y. I don't want any commitment from you at this juncture, but could you tell me whether there is a chance that your client might approach this range?" The theory behind this approach, of course, is that this kind of opinion might serve as the cold shower of realism that a party needs to persuade it to make meaningful movement. However, you should use this device only late in negotiations because it essentially pressures the parties to "fish or cut bait." As such, it can backfire, resulting in an abrupt end to the conference.

It is important that a settlement judge not take too literally what lawyers say about their clients' settlement positions. This means, among other things, that it is a serious mistake to give up at the first sign, or even the second or third signs, of impasse.⁷⁴ When a judge arrives at an apparent impasse he should not give in, but instead return, at least for a short time, to the analysis stage. A judge should go back to the evidence and the law. He must ask the attorneys to detail the line of reasoning that leads to the figures their clients have put on the table. The judge must make them proceed systematically; he cannot permit them to skip elements of their claim or defense or to slide past any significant assumption in their damage calculation. He must make sure, in other words, that their reasoning is tight and linear. He needs to point out every assumption that is not fully supported and each weak link in the evidentiary chain. He should gently but persistently try to soften each side's conviction about its figures by reasoning about risks.

If more vigorous analytical review of the parties' claims and defenses does not yield the necessary movement, the judge might consider resorting to one or more of the tools for breaking logjams described below.

1. *Substantive and Procedural Ideas for Breaking Logjams.* One of the first things a judge should consider when negotiations have hit an impasse is simply to take a break. Sometimes parties need time to integrate what they have learned during the conference with the information and perspectives they developed before it began. Sometimes they need emotional or psychological space to adjust the expectations or hopes with which they entered the negotiations. Sometimes tempers

74. Author's personal experience.

need to cool or anxieties need to subside. So, when things look bleak, take a break. A judge might invite the participants to return in a few days or perhaps even in a few hours. If it appears that movement is impossible without additional information, a judge should help the parties develop a plan to complete specified discovery or investigative work and set a date on which they will return for a follow-up session.

In addition to giving the parties the space they need, and helping them plan how to acquire additional information, the settlement judge can make a significant contribution by suggesting forms of compensation or elements of settlement packages that could supplement or serve as alternatives to straight cash payments. These kinds of ideas can be especially useful when the principal defendant has cash flow problems or for some other reason is having difficulty moving toward the kind of cash figure it would take to produce a settlement. The list of supplements or alternatives to cash payments that follows is by no means exhaustive; a judge's goal should be to look for similar items or exchanges that the situation of the parties before him might make possible.

1. mergers or buy-outs (consider guaranteeing key actors in the company that will no longer exist attractive positions in the emerging company);
2. joint ventures;
3. licensing agreements;
4. pay-off in products;
5. pay-off in shares of stock;
6. pay-off in future business or discounts on future purchases;
7. a commitment to help find customers or clients for the opposing party;
8. changing the terms of a continuing, long-range relationship;
9. offering an apology;
10. arranging for a press release (e.g., to trade papers or magazines, attempting to correct negative impressions about a party made as a result of the events leading up to the suit);
11. corporate defendant rehiring terminated employee or securing a job for plaintiff at another corporation.

Another idea that might break a logjam is to suggest to the parties that they jointly retain a neutral expert to form an opinion about the issues that separate them or to propose a plan or framework for a

possible settlement. The range of experts that can be useful in this setting is almost limitless and includes physicians, scientists, electronic specialists, engineers, market researchers, advertising specialists, investment counsellors, organizational consultants, accountants, and real estate brokers. In one case I handled not long ago, the key to apportioning fault between the defendant and the decedent was the answer to a physics question: given the weight of the decedent, and the garments he was wearing, how close to the intake channel of a jet engine he was working on would he have had to have been to be sucked in during a full-power test? When the parties came to our first settlement conference without well-developed answers to this question, I saw a perfect opportunity to encourage a cost-effective settlement through the use of a neutral expert. At the time of the first settlement conference, neither party had spent a lot of money on discovery and the trial date was not imminent. I suggested that the parties jointly retain an expert in whom both had confidence and agree in advance that no matter what her opinion turned out to be, neither party would be permitted to call her at trial or to use her or her report in any way in connection with the litigation at hand. The theory behind this suggestion was to create a relatively inexpensive vehicle by which the parties could acquire an expert, impartial, and confidential answer to the key question in the case before investing a lot of money in the traditional forms of pretrial jockeying. The parties could use the expert's answer as an important factor in their negotiations but not be bound by it in any way.

In cases that involve multiple parties, a judge might consider separating out and trying to get an agreement first with the party who seems most flexible or exposed. By getting one party to accept terms you might create a sense of momentum, or apprehension among the others that they could be left sitting alone at trial.⁷⁵ A similar strategy involves separating out the defendant whose attorney is the most highly regarded in the defense group and trying to strike a deal with that lawyer's client. The theory here is that the other lawyers may be heavily influenced by the route taken by their highly regarded colleague.

In mass tort situations, a settlement judge who is simultaneously handling many individual claimants should consider working with the lawyers to create heterogeneous groups of cases and then attempting to get the parties to agree on a figure for each group rather than for each claimant.⁷⁶ Claims arising out of exposure to asbestos can range from trivial to enormous, with innumerable variations in between. Faced with scores of asbestos-related claims, Judge Lynch and the lawyers with

75. CAL. CIV. CODE §1431.2 (West 1987).

76. Author's personal contact with Judge Lynch.

whom he worked formed groups of about six cases each, with each group including cases that covered a wide range of damages.⁷⁷ In the negotiations, the judge encouraged counsel to focus on the settlement value of the groups as a whole.⁷⁸ This grouping of diverse cases permitted opposing counsel to disagree about the valuation of individual cases but nonetheless agree about the total value of the group.⁷⁹ Thus the grouping created a vehicle by which differences of opinion could be neutralized. This approach can work effectively only when one lawyer or one law firm represents all the plaintiffs, or when there is a close working relationship among plaintiffs' counsel, and where the judge has confidence that plaintiffs' counsel will not sell some clients short in order to get a better deal for others in the same group.

A very different tool for attempting to break logjams bypasses the lawyers and looks directly to the clients. Surprisingly, it was a group of lawyers who first suggested to me the idea of removing the litigators from the process and having the clients directly conduct negotiations, using the court as an intermediary. The case involved a dispute between a group of employers and agents of a union. Negotiations led by the lawyers had produced nothing. Yet there seemed to be a feeling that progress might be made if the clients themselves could speak directly to a judge, in private, and hear his perspective on the positions taken by each side.

Several factors seem to help explain the interest in having only the clients work with the judge. The parties may not have had full confidence in the advice they were receiving from their lawyers. They wanted independent confirmation, and they would trust that confirmation more if they heard it in an environment from which the lawyers were excluded. A second factor was the parties' feeling that since they were professional negotiators (as managers and union representatives) they deserved an opportunity to see how they could do on their own. Also, each side seemed to believe that only a judge could talk sense into the clients on the other side, and that the judge's ability to deliver his sobering message would be enhanced if the filtering effect of the lawyers was removed. The procedure worked. After a day of sometimes emotional exchanges, in a series of private caucuses, the parties managed to develop a foundation for a settlement.

In another case, the parties' motive for suggesting that they meet directly with me was clear. The chief executives of the two companies

77. For a general discussion on how lawyers should handle settlement conferences, see Lynch, *A View From the Trial Bench*, in TRIAL HANDBOOK FOR CALIFORNIA LAWYERS 983 (1986); Lynch & Levine, *The Settlement of Federal District Court Cases: A Judicial Perspective*, 67 OR. L. REV. — (1988).

78. *Id.*

79. *Id.*

viewed their dispute as essentially a business problem and they felt that they were more likely to arrive at a commercially sensible solution if they took over the negotiations directly. They wanted to use a judge as an intermediary because their relationship had been scarred by distrust, and one of the executives felt that the judge's participation in the process would add an extra measure of protection against being out-negotiated by his more aggressive opponent. When I met with the principals we negotiated in two formats: (1) face-to-face, with all three of us present, and (2) in private caucuses, in which I met with each principal individually, then played shuttle diplomat. The principals liked this process and felt that it gave them an excellent opportunity to explore options and explain concerns. They did not reach agreement in the two sessions I hosted, but their communication paved the way for an eventual settlement.

A judge should not be the first to suggest that clients work directly with him and that the lawyers be excluded from part of the negotiations. A judge who forces himself between a lawyer and his client challenges basic premises of our system and creates great risks. One or more of the parties may slip into viewing the judge as her lawyer, thus losing her advocate without knowing it. Moreover, a client who views the judge in this way may be much more inclined to sue the judge for malpractice. In addition, the bar would justifiably resent a judge who interfered with relations between attorney and client in this way, implying that the judge could do better for the parties than their lawyers could. Judges will virtually never know as much about the case, or the parties' situations outside the litigation, as their lawyers do. For all these reasons, judges should be very cautious about the circumstances under which they agree to mediate disputes directly between principals, without the presence of counsel. A judge who feels that a client is not getting good advice, or who is afraid that offers or demands are not being communicated to a client, need not resort to this device. Instead, he can meet with that client in the presence of his lawyer, and in that environment share with the client all the information he feels is appropriate.

2. *Moving Outside the System: ADR.* Judges who feel that they have exhausted the procedural options available to them within the framework of settlement conferences should actively consider suggesting some form of alternative dispute resolution. In making such a suggestion, the key is to first identify what the principal obstacles to reaching settlement are, then to point the parties toward the particular form of alternative dispute resolution that is best designed to overcome those obstacles. Some forms of Alternative Dispute Resolution (ADR) are specially designed to attack problems in communication, such as mediation; others are designed to generate new information, or a new perspective on old

information, such as joint retention of a neutral technical expert; others force the top-level decision-makers for the parties to confront a trial-like presentation of the opposition's best case, then offer an opportunity for those decision-makers to try to negotiate their own solution, such as some forms of mini-trial and summary jury trial.

If there is no desire in one or more of the parties to search in good faith for a reasonable solution, it may not be wise to press for ADR in any form. If, for example, the obstacle to settlement is a party's hard-nosed, self-conscious manipulation of its economic power, the best course is to get the case to trial as quickly as possible. There probably are relatively few cases, however, in which the real obstacle to settlement is some ulterior objective that is immune to influence by information, reason, communication, and improvement in levels of trust. It follows that judges should be reluctant to conclude that any given case is beyond hope of settlement. Failure to generate an agreement in a settlement conference should not discourage the judicial host from considering alternative procedures.

3. *Devices of Last Resort.* If sending the case to some form of alternative dispute resolution does not seem to make sense, or if the judge wants to play a few high cards before giving up on the settlement conference format, there are additional tactics that could be employed. These are last resort devices. They can backfire and result in an abrupt termination of the conference. They can also damage the parties' incentives to continue to talk, or to look for other procedures that might carry them to a solution. They should be used with caution.

If, after the judge has devoted a great deal of analytical effort to a conference, a lawyer persists in taking a position that the judge considers extreme, and that jeopardizes the negotiations, the judge might say: "Well, I hate to say this, but it looks like we just aren't going to make it. I seem to have run out of analytical leverage. I'm afraid you are about to lose me as a resource in this process."⁸⁰ If a party has a real interest in settlement, fear of the collapse of the conference, and the loss of the judge as an intermediary, can move that party to become more realistic. In other words, a judge's thinly-veiled threat to stop trying to help the parties can smoke out hidden offers or demands. On the other hand, of course, there is a real risk that a litigant will not be moved by such a threat and will agree that the conference should terminate. Because this risk is real, a judge should not use this threat until she has exhausted her arguments and patience.

Another last resort device consists of pressing one or both parties for

80. I have been surprised on several occasions that this kind of comment has made an apparently intransigent party suddenly become more flexible.

their real bottom line figure. Talking in terms of bottom lines is dangerous. Lawyers and judges should avoid resorting to these figures, or using this phraseology, until they have in fact exhausted all other analytical and negotiation alternatives. Once that point is reached, the judge might consider asking the side that he considers the more reasonable - the side that is more likely to have a realistic bottom line - to put that number on the table.

I used this approach successfully in a major case that pitted a large corporation against professional negotiators for a labor organization. We had tried several different approaches, but our search for common ground had failed. Near the end of the second or third long conference, I sensed the need for a breakthrough device. I met privately with the attorney for the corporate defendant, and persuaded him that if he gave me a bottom line figure that I thought was reasonable, I would do my best to persuade the other side that (1) the figure was reasonable and (2) that it really was the bottom line, that there would be no last minute movement in it, and that unless the plaintiffs accepted that figure, the case would be tried to judgment. The risks in this approach are obvious. A lawyer who insists, through the judge, that his client will not change an offer risks huge loss of face and credibility if he caves in at the last minute (unless some major new development fortuitously offers an excuse). The judge who vigorously attempts to persuade a party that an offer made by an opponent really is a bottom line number also risks loss of credibility if there is a subsequent change in that figure. Moreover, presenting a bottom line figure can be perceived as a power play and can inspire a defensive, rigid rejection. And, if the bottom line figure is rejected, communication can stop altogether, making trial inevitable. On the other hand, if well-represented people have worked hard at the settlement process for a long time, and if at least one side has enough confidence and common sense to put up a realistic last number, this approach can break deadlocks.

In gearing up this kind of presentation, however, a judge first must take care to have a thorough discussion with the party who would be making the offer. The judge must be sure that the party understands what he would be doing and the risks this kind of move creates. The judge must be satisfied that the lawyer and the client who would be putting the bottom line number on the table have thought the matter through very carefully and are committed to going to trial if their opponents do not accept the number. If the number the party comes up with after this kind of pep talk seems unrealistic, the judge probably should give up on this approach, urge the parties to take a break for a few days, and resume negotiations in another environment. But if the number seems reasonable, the judge then must go to the opposing side and make a very vigorous presentation aimed at erasing doubt that the

figure really is the bottom line. Few negotiators are likely to believe that any number is really carved in stone. Thus, the judge who chooses this course must overcome big hurdles. He must fight through cynical assumptions about the posturing that tends to dominate negotiations of this kind and convince the opposing side that the offer or demand being presented as the bottom line is the lowest, or highest, figure that will be put on the table in this case.

The judge might make a short speech that includes points such as the following: "We have analyzed and negotiated this case exhaustively. Yet we have appeared to remain at loggerheads. I have run out of steam. So I have decided to try something unorthodox and risky. I have gone to your opponent and pressed him aggressively for his client's real bottom line. I have told him that if he comes up with a figure I like, that I think is reasonable, I will try to persuade you to accept it. More to the point, I have made it clear that I will tolerate no movement in his number if he gets me to come in here and present it to you as his real bottom line. He has persuaded me that this is the number above which his client goes to trial. He and I think this is a fair and reasonable number. Our goal is not to pressure you into a corner. Instead, our goal is to try to get this matter settled, to break the apparent logjam, and permit the parties to get on with their lives. Toward this end, I have persuaded your opponent to paint himself into a corner. He knows that he cannot change this number, once I present it to you as his real bottom line. I have assured him that there will be no 'nickle and diming' from this figure, that I will not ask him to make any adjustments. So please do not view this as an opportunity to make another counterproposal and to leverage him into a position where you make a few extra dollars. I will not communicate a counter to him, because he could not accept it and live up to the terms of the agreement we made when I persuaded him to put the figure on the table. So this represents our last chance. I honestly feel that the number is fair to both sides, and I very much hope you will agree and will accept it. If not, there will be no hard feelings. So let me give you the number, then give you time outside my presence, to talk privately among yourselves about how to respond. I hope you appreciate that I am doing this only because I think that this is a case that we ought to be able to settle but that after all the work we have put in there seemed to be no route to common ground, other than this rather risky approach. I believe this offer is made in good faith. I know that you will respond in a similar spirit." Then the judge should present the offer and leave the room, so that the lawyers and clients to whom it is directed can consider the matter privately, in an unpressured environment.

There is a less risky variation on this approach that Chief Judge Gerald Weatherington of the Circuit Court in Dade County, Florida,

has used successfully.⁸¹ If substantial efforts to help the parties find common ground by reasoning and traditional forms of negotiating fail to generate an agreement, Judge Weatherington asks each side if it would be willing to give him its bottom line or top dollar figure secretly, by writing it on a piece of paper that is for his eyes only.⁸² The judge explains that he will not disclose these numbers to anyone.⁸³ He goes on to explain that he will use the numbers only to make a judgment about whether the parties are so far apart that there is no point in continuing to negotiate or are close enough to make it worthwhile to take a break and then try again.⁸⁴ He reassures the parties that after he has read the numbers, he will communicate one of only two possible messages: "I think you should continue working toward settlement" or "It looks like you are going to have to try the case."⁸⁵ A party that knows that there is a possibility that he will be called upon to negotiate further, and to make additional adjustments in his position, might not provide the judge with his real bottom line. But Judge Weatherington believes that this approach induces most parties to give him a figure that is close enough to the true bottom to serve the purpose of this procedure.⁸⁶

What should the judge do if the "final" numbers that the parties submit in confidence (either in writing or orally) do not overlap, but are not light years apart? He should not automatically assume that there is no room for movement. In a case I handled some time ago that ultimately settled for a figure in the vicinity of \$1,500,000, there was a \$300,000 gap between the bottom line figure the plaintiff secretly submitted and the top dollar figure the defendant secretly submitted. The parties gave me these figures near the end of the fourth settlement conference in that case (we had negotiated for at least ten hours over the course of the four conferences). Despite the substantial gap, I sensed that both sides really wanted to settle, and that even though the figures had been described, when submitted, as bottom line or top dollar, there was a possibility of more movement if both sides believed that there was a chance of closure that day. Each side distrusted the other. Each side also feared that because trial was still months away their opponent would "nickle and dime" them all the way to the courthouse steps. Each side wanted to put virtually nothing more on the table. However, in talking privately with each side, I developed a sense that a fair

81. Address by Judge Weatherington at a conference which the author attended for trial judges in Florida (1986).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

number was right in the middle of the two "final" figures and that we had a chance of getting there. So I went to one side and said "I have a good feeling that we can close this thing today. But to get all the way home I am going to have to get some movement out of both sides. If you will put "X" dollars on the table now I will use all the persuasive energy I have to press the other side to agree and I think we will make it. I really think that "X" is a fair settlement value. If you give it to me, I promise that I won't ask you for another penny. I will tell the other side that the offer of "X" dollars is good only for the next half an hour. I also will tell them that I will not bring back any counter to you. In other words, if you give me this number, I will make it clear to them that this does not represent an opportunity to leverage a slightly better figure from you. I will tell them in no uncertain terms that this is it, that I want them to accept it now, and that because the figure is fair we should end this right here and now. If they stall, I will warn them about abusing the process and your good faith and will tell them that I will make no further efforts to help them settle this case."

With considerable trepidation, the team of lawyers and clients to whom I was talking fought through its distrust and agreed to make the offer. I went to the other side and made my pitch, emphasizing that in my judgment this would represent an eminently fair settlement, made in clear good faith, and that it should be accepted. There was a moment's hesitation, as the party to whom I was talking obviously toyed with the idea of trying to make a counter. I jumped in, repeating that I would communicate no counter, that after all our work I knew that the number on the table was fair and I would not try to leverage the other side up. The members of the plaintiff team looked at one another, nodded almost in unison, and agreed to accept the number that was on the table. We had a settlement.

I should emphasize that I would not have been as assertive as I was, would not have made the threats to pull myself out of the process that I made, and would not have refused even to communicate any counterproposal if I had not already spent many hours with the case and if I had not been confident that the number finally offered really was fair. It was important to me that there were "big boys" on both sides, fully capable of assessing the value of the case and of protecting themselves in the negotiation dynamic. Because it was a commercial case, pitting sophisticated opponents who clearly had come to the final conference with well-worked out ideas about what kinds of figures were acceptable, and because the case was informationally mature, with each side knowing a great deal about the evidence and law, neither side could offer any legitimate excuse for refusing to "fish or cut bait." These circumstances made it appropriate to resort to the "last resort" strategy described above.

IX. STEPS TO ASSURE CLOSURE AFTER THE PARTIES REACH AGREEMENT IN PRINCIPLE

Unfortunately, it is not safe simply for the judge to have the parties shake hands and leave after they have reached an oral agreement in his presence. Minds that appear to meet may not; and commitments actually made can be dislodged by second thoughts. "Settler's remorse" may set in and cause a party to attempt to retreat from an agreement, or fights may break out later over matters that the judge assumed were unimportant details. A judicial host should run through the following check list at the end of a conference that appears to have concluded successfully.

(1) Make sure that the persons making the commitments have the authority to be making them and that there are no contingencies that remain to be satisfied. If there are authority problems, or contingencies, a judge must identify them specifically and set up a procedure to clear them. If home office approval is required, for example, a judge should fix the date by which it will be secured and order the lawyer for that party to send him a copy of the letter from the home office that reflects its decision. A judge should fix the date by which any other contingency will be removed and order the party responsible for removing it to notify him promptly in writing when the contingency is indeed removed. If he does not hear by the date fixed, he should write to the lawyer for that party and ask for an explanation.

(2) While all the lawyers and parties are still at the conference, a judge should get as much of the substance of the agreement as possible committed to a writing or on the record. I have a tape recorder in chambers that I use for this purpose. I ask one of the lawyers to summarize, on the tape recorder, the elements of the agreement and the procedures that will be followed to execute its terms. Then I ask opposing counsel to affirm the accuracy of what has been recorded and to affirm his client's assent to it. It is especially important to get the clients' commitments on the record when they have displayed an inclination to overreach, to second-guess counsel irrationally, or to change their minds without apparent reason during the course of the negotiations.

(3) Avoid leaving loose ends. Before the participants leave the conference, a judge should make sure that there are clear commitments, understood by all, about who will draft the agreement, when that person will deliver the draft for review to the other side, when the money will change hands, and when any other acts specified in the agreement will be commenced and completed. A judge must be sure that there are no misunderstandings about who is to pay the attorneys' fees and the various components of "costs." I have seen large settlements threatened because, after the conference, the parties disagreed about who was to pay expert witness fees or photocopying expenses incurred during dis-

covery, or about whether the money figure that was agreed to during the conference included sanctions that the court had imposed earlier in the litigation. Judges also should beware of latent potential disputes about confidentiality clauses, releases of agents, subsidiaries, or predecessors-in-interest, releases of undiscovered claims arising out of the events that triggered the suit, indemnification for tax consequences, or characterization of damages for tax purposes. It also is important to have the parties reach a clear understanding about whether the settlement contract will include an admission of liability or a clause expressly declaring that neither the fact of settlement nor any provision of the agreement should be construed as an admission of liability.

There usually is such an emotional climax when the parties agree on the dollar amount of a settlement, and such a rush to leave, that it is difficult to get anyone to attend to these kinds of details. Unfortunately, disagreements about details can cause a much larger structure to unravel, especially when the relationship between the parties is infected by serious distrust. There also is a risk that parties who later develop second thoughts about commitments they made during the conference will use disagreements about details as excuses to justify refusing to be bound to the settlement. So, even though the emotional momentum makes it difficult to focus on such matters at the close of a successful conference, it is wise to leave as little as possible to be "worked out later." By taking the final step of committing people to complete specific tasks by fixed dates, you improve the odds of prompt closure and foster a positive momentum that discourages the parties from looking over their shoulders and questioning the decisions made at the conference.

X. THOUGHTS ABOUT THE ROLES OF CLIENTS AND ABOUT HOW JUDGES SHOULD INTERACT WITH THEM DURING SETTLEMENT CONFERENCES

Before discussing sensitivities that judges should develop about clients, it is important to point out how lawyers can abuse their relations with their clients during the negotiation process. The most obvious form of such abuse consists of failing to communicate to their clients all offers or demands, or all the elements of offers or demands. A judge who suspects that a lawyer is not telling her client about all settlement proposals should consider asking that lawyer for permission to meet with counsel and her client jointly and, in that setting, to explain the terms of the most recent settlement offer or demand. In this context, it is not a good idea for the judge to ask for a meeting with a client outside the presence of counsel. Such a request is likely to be perceived for what it is: an attempt to intervene into the attorney-client relationship.

There are other means of ensuring that settlement proposals actually reach the clients at whom they are targeted. One method is for the

judge to ask that the proposal in question be committed to writing and that the client to whom it is directed acknowledge receipt of the proposal by signing the document containing it. The judge also might ask that the target client write out his response or counterproposal on that same piece of paper.

A more ambitious and riskier device for making sure that offers are reaching the client on the other side is for the judge to permit counsel for the offering party to make an oral presentation, in his presence, to opposing counsel and his client. Such a presentation could be confined to describing the elements of an offer or it could be expanded to include analysis of the relevant evidence and law. Unless orchestrated thoughtfully, this procedure can backfire and offend opposing counsel. I once tried this approach near the close of a conference in which I had been privately caucusing with one lawyer at a time for hours. Defense counsel told me that he was very concerned that his client's offers were not reaching the plaintiff. He asked me to ask plaintiff's counsel if he could make an oral presentation to the plaintiff, in the presence of his lawyer. I asked plaintiff's counsel, who reluctantly agreed. The presentation subsequently made by defense counsel began with a one-sided, heavy-handed argument about liability and concluded with an unrealistically low offer. Plaintiff's counsel was outraged, and said so in the presence of his client. He said that the presentation by defense counsel was an obvious ploy to interfere with his relationship with his client. More specifically, he said, the presentation by defense counsel clearly suggested that his (plaintiff's counsel's) analysis of the case and his advice to his client, which were radically different from the views expressed by defense counsel, were deficient and unreliable. Plaintiff's counsel resented this implication. He resented even more the fact that it appeared that the court endorsed this implication. Why else, he asked, would the court ask him to permit defense counsel to make a presentation to his client, but not ask him to make a presentation to the defendant? The presentation also put plaintiff's counsel on the defensive; it provoked him to launch intensive efforts to persuade his client that the presentation by defense counsel was totally without merit. Needless to say, the conference did not yield a settlement.

What are the lessons to be learned from this example? Perhaps the most important is to be sure that there is balance in any procedure. In this context, balance means giving both sides the same opportunity. A judge who is going to permit any presentation should make sure that both sides have an opportunity to make the same kinds of pitches to their opponents. It also is a mistake, after a series of private caucuses, to permit a lawyer to make a presentation that the judge has not reviewed in advance and determined to be reasonable. A sloppy presentation of a self-serving proposal will alienate the opposition. Thus, the

judge should first review the content of each presentation in private sessions with each lawyer to make sure that what they planned to say is within the realm of reasonable proposals. Finally, it is important for the judge not to invite an inference that the real purpose of presentations like these is to permit one lawyer to step between another lawyer and his client. The odds that such an inference will be drawn increase if the judge asks only one side to make a presentation, or if it is clear that the idea for making a presentation did not originate in the judge, but in a lawyer for one side.

There probably are circumstances in which presentations by counsel to the opposition might be very useful, but a judge who wants lawyers and parties to consider this procedure as part of a traditional settlement conference must proceed carefully. A judge who wishes to employ this technique should explain that what he has in mind is similar in structure to the "mini-trial."⁸⁷ If the judge senses distrust, and if the situation permits the judge to reconvene the conference on a subsequent date, he could direct the lawyers and parties to some of the considerable literature about mini-trials.⁸⁸ After the parties and their lawyers have had a chance to familiarize themselves with the literature, the judge could schedule a telephone conference to discuss whether they would like to proceed along these lines and, if so, how they would like to adapt the process to their specific situation.

Another way a lawyer can misuse a client in a settlement conference is by dishonestly casting the blame for unreasonable demands or intractability on her client. Lawyers sometimes use their clients as excuses for refusing to moderate their positions during negotiations, pretending to have client control problems that they in fact do not have. A judge who suspects that a lawyer is misusing her client in this way might consider asking to have a joint meeting with attorney and client so that he (the judge) can determine what the real source of the resistance is. In such a meeting, the judge should not lead off by making a presentation to the client. This approach would invite counsel and client to infer that the judge does not trust the lawyer and is stepping between her and her client. It is preferable for the judge to ask the lawyer to explain

87. The mini-trial procedure has been used successfully to settle many large cases involving sophisticated corporate clients. See D. PROVINE, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* 76 (1986).

88. E.g., BUREAU OF NATIONAL AFFAIRS, INC., *RESOLVING DISPUTES WITHOUT LITIGATION*, A BNA SPECIAL REPORT (1985); S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985); CENTER FOR PUBLIC RESOURCES, *THE CPR LEGAL PROGRAM MINI-TRIAL WORKBOOK* (E. Fine ed. 1985); CENTER FOR PUBLIC RESOURCES, *ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS* (E. Fine ed. 1987). Cf. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, A Report to the Judicial Conference of the United States in January 1984*, 103 F.R.D. 461 (1984).

to her client, in the judge's presence, the content of the settlement proposal that opposing counsel has made and the reasoning that he has offered in support of his proposal. If counsel omits important elements of the proposal, or if her description of the reasoning that supports it is inaccurate, the judge could make sure the full message is delivered by saying something like this: "Ms. Jones [the lawyer], I don't mean to interrupt before you have completed your account of [the other side's proposal], but this might be a good place to mention [whatever she has omitted or misstated]." By using this phraseology the judge does not appear to be correcting or displacing the lawyer; instead, the judicial host inserts the information he wants the client to hear without directly challenging counsel. This relatively unthreatening approach gives the lawyer an opportunity to save face with both her client and the court.

After satisfying himself that the client has heard the full proposal from the other side, and a fair description of its rationale, the judge might ask the client directly, but gently, for his reaction. Interactions between judicial host and client in this setting obviously must be handled with sensitivity. Because settlements are legitimate only if they are consensual, and because judges are in a position to exercise considerable influence over laypersons, it is important that the judge not appear to be pressuring the client to accept any given proposal or to modify his position. There is less risk that the judge will inadvertently give this impression when he is dealing with a representative of a large institutional or corporate client than when he is dealing with an individual who has had little or no previous exposure to litigation.

Individual litigants will sometimes feel both out of their element and over their heads.⁸⁹ Some clients fear that they do not understand the legal theories, the implications of the evidence, or even the procedures of the settlement conference itself. These kinds of fears are most likely to arise when a natural person is represented by a solo practitioner or a lawyer from a small office and is pitted against a large corporate defendant, represented by lawyers from a large, high visibility firm. In this setting, the natural person client may feel especially intense pressure to appear (to the judge and to the opposition) to be in control of the situation, to appear to be just as tough or as formidable as he perceives his larger, more expensively represented opponent to be. Individuals in this situation can be very concerned about being "duped" or "taken" by more sophisticated or more clever opponents.⁹⁰ Some individuals are acutely afraid of selling their case too cheaply, or of accepting a proposal that is too favorable to the opposition. At another level, independent of

89. Author's personal experience.

90. *Id.*

the real merits of proposed deals, some people are afraid of being perceived by the judge as being unsophisticated and of being “tricked” into a bad deal by the other side.

All of these fears and suspicions tend to produce the same kind of reaction: a rigid, sometimes pugnacious defensiveness. The natural person client tries to protect himself from his bigger opponent and from the things he does not understand by projecting an image of toughness, and he tends to equate toughness with inflexibility. Thus, it can be very difficult to persuade him to make adjustments in his position, or to compromise in order to find common ground. These problems are likely to be compounded if the individual perceives the judge as pressuring him. A client who feels pressure from the judge may infer that the judge is lining up with the other side, and a client who draws this inference will feel an even greater need to protect himself, as he will perceive “the whole system” to be lined up against him.

A judge who interacts directly with natural person clients should take steps to reduce the fears and suspicions that can frustrate efforts to reason toward an agreed disposition. It is imperative in this setting that the judge resist any temptation she might feel to be intellectually or emotionally aggressive with a client whom she perceives as being unreasonable or obstinate. Such aggressiveness not only is inconsistent with the judicial role, and thus improper, but also is quite likely to be counterproductive. It is likely to cause the client to dig his heels in deeper, to intensify his resolve not to accede to what he may perceive as a conspiracy to deprive him of what is rightfully his.

Unfortunately, avoiding behavior that the client might perceive as coercive probably will not be enough. The judicial host also should take affirmative steps aimed at helping the client come to terms with the fear that makes him feel the need to protect himself. The affirmative steps I take often include the following. First, I make a “soft speech” about my role in the settlement conference. This speech usually runs along these lines: “I would like to share some thoughts with you about how I view my role in this process. I consider it completely unprofessional, and therefore unacceptable, to abuse the power of my position by putting pressure on any party or lawyer. I certainly would resent it if a judge tried to pressure me to do something I did not feel was fair. I know that judges do not settle cases. Cases are settled by clients and lawyers, when they freely decide on terms that each finds acceptable and preferable to the expense and risk of going to trial. Decisions about whether to settle, or what terms to propose, are entirely yours, and I have no intention of trying to interfere with your exercise of your right to make these decisions.” I point out that “it is my job to help litigants and counsel analyze their situations systematically and to develop a

richer understanding of how judges and jurors are likely to react to the positions they would be taking at trial. The taxpayers (among whom you are included) pay me to do two things, both of which I take very seriously: to be fair and to help people reason toward solutions to their problems. The whole purpose of the judicial system is to replace fighting with reasoning."

I close my "soft speech" about my role by reassuring the client that "it sometimes happens that even after lots of conscientious effort by all participants, we fail to reach common understandings or to find mutually acceptable terms. I know that there are circumstances in which reasonable people can disagree, in good faith. When that happens, I harbor no hard feelings. I hold nothing against the parties or their lawyers. As long as people try in good faith to reason together, I feel that my efforts are well spent and the conference is not a failure. So please do not worry if, after we discuss things, you cannot reach an agreement with the other side or if your view of the case, and of what an appropriate settlement would be, differs from mine. I know that I have no corner on the wisdom market, and I lose no respect for people whose reasoning takes them to a different conclusion than I would reach. As you know, I will not be the judge who will preside at trial. You also should understand that we have a strict policy that prohibits me from telling the assigned judge anything about what is said or done during the settlement negotiations. Other than learning through my minute order whether the case settled or not, he will hear nothing from me about what transpires here."

In addition to making this "soft speech," I take other steps designed to make the clients feel comfortable and to improve their understanding of the situation. I self-consciously strive to avoid using terms of art or pretentious professional vocabulary. Instead, I try to speak in everyday language and attempt to reduce the law's over-subtle concepts to their common-sense cores. If called upon to explain any proposal that is on the table, or that I recommend, I go out of my way to explain forthrightly both the pros and cons I see in it and the reasoning that supports it. It is a serious mistake to gloss over the "cons" of some offer or demand that you hope the client will entertain hospitably. The client's lawyer is likely to bring the negatives to the client's attention in any event, and the judge loses precious credibility if he gets caught trying to divert attention from or to understate such matters. If the judge squarely acknowledges the negatives, the client is more likely to trust him and to have confidence in his overall assessment of the proposal.

Similarly, it is important that the judge's explanation of the reasoning that supports a particular offer or demand be sufficiently specific and clear to assure that the layperson fully comprehends it. If the client fully understands the reasoning, he will feel more secure. If he does

not understand it, he is likely to remain suspicious, and may infer that the judge is trying to trick or dupe him into accepting something that cannot be supported. Of course, there are times when the reasoning cannot be airtight, either because potentially important information is missing, or because the judge is forced to guess about how some other person or persons (usually a judge or jurors) are likely to react to the available information. In these circumstances, the most credible and therefore the most effective course happens to be the only course that is consistent with the judge's oath of office: honesty. The judge should candidly identify those places in his reasoning where he is forced to make assumptions or judgments. He also should explain why he made the assumptions or judgments he did. Whatever the case, the judge should expose fully what he is doing. This full disclosure will enhance the litigant's confidence in the judge's integrity and improve the litigant's capacity to assess the reliability of the judge's analysis and the wisdom of any recommendation.

I also have found it useful to reassure litigants that my job in this setting is not to pass personal judgment on any alleged behavior or on any person, but instead, simply to serve as a source of objective data or information that the parties may take into account when reaching their decisions. When articulating my analysis of the parties' respective positions, I strive to make it clear that my assessments do not reflect my personal values. Rather, they are based on my understanding of the relevant legal principles, evidence, and my experience with similar cases. I have found it to be especially important to sterilize my assessments of the credibility of competing versions of the same events and my reactions to parties' claims about the value of various components of damages. I never tell a litigant that I do not believe his story. Instead, I point out why I think that jurors, generalizing from everyday experiences and having no special knowledge of the circumstances, are more likely to find persuasive the alternative version of the events.

The value of damages is a subject about which parties (especially the party who suffered the harm) can have very intense and idiosyncratic feelings. Moreover, because some kinds of harm are virtually impossible to value objectively, there is an especially high risk that the judge's assessments of them will in fact be heavily colored by personal value judgments. Consequently, whenever possible the judge should refer to results in other lawsuits to assess the value of such harms. For example, if a party tells the judge that he expects a jury to award him a million dollars for a soft tissue injury, it might be most constructive to respond along the following lines: "I know this injury has caused you great pain, and really has disrupted the quality of your life, but I think it is important, when you make your decisions during this conference, to know that the largest award a jury ever has made in this district for

a soft tissue injury is \$30,000, and that the average figure for such awards is about \$7,000. The way you calculate the value of your injury may make good sense, but it is important for you to know this objective data about the environment in which your case would be tried." If no such objective data is available, the judge should frankly admit that fact and acknowledge that his assessment of the value of the harm in question is the product simply of a good faith neutral judgment.

XI. IF THE CONFERENCE DOES NOT RESULT IN AN AGREEMENT

Judges who are just starting out in settlement work should understand that most initial settlement conferences do not result in settlements. It usually takes two or more conferences to exhaust the possibilities. Thus it is inappropriate for a judge to blame himself whenever a conference does not produce an agreement. Rather, judges should anticipate that a follow-up session will be necessary.

When any given conference does not produce an agreement it is important for the judge to call everyone together and to thank the parties and their counsel for their conscientious work. It is equally important to discourage the parties from leaving the conference with the sense that trial is inevitable and that this should be the end of their efforts to reach an agreement. The judge should say one more time that he thinks that this is a kind of case that could be settled. Then he should encourage the parties to keep talking and to acquire any information that might help them reassess their positions. Finally, he should make it clear that he would be happy to host a follow-up conference. If there is any reason to believe that such a session might be productive the wisest course is to fix the date for it, on the spot, before the litigants leave. If the judge fails to take this step there is a real risk that neither party will ask for a second session even though both are interested. The parties might not ask for another conference out of fear of seeming "too interested" in settlement or merely because they get caught up in the eleventh hour momentum toward trial. It is a shame to lose a chance for a settlement for these reasons.

XII. CONCLUSION

In conclusion, it is important to emphasize a point made at the outset. No judge could possibly do all the things that this Article covers in any one settlement conference. This Article is a smorgasbord of ideas and techniques from which judges might try certain items, either as I have presented them or by adapting them to fit their own tastes and the needs of the situations they confront. I hope that in reading my thoughts on these matters a good number of judges will be moved to

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reflect on their own experiences and to contribute their insights to a continuing dialogue through which all of us can become more effective in this important part of our work.

